87-614

Supreme Court, U.S.
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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

No. -

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., and
FANTASY TWO, INC., *Petitioners*,

v.

STATE OF INDIANA, *Respondent*.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

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## QUESTIONS PRESENTED FOR REVIEW

### I

Is Indiana's criminal RICO statute (IC 35-45-6-2 et seq., the Indiana Corrupt Business Influence Act) violative of the First and Fourteenth Amendments to the Constitution of the United States to the extent that it allows prosecution for criminal RICO on the basis of two or more allegations of obscenity violations where those violations are not reduced to convictions?

### II

Are the First Amendment procedural safeguards of *Heller v. New York*, 413 U.S. 483 (1973) violated by a state law which allows the arrest and prosecution of an individual for criminal RICO based upon predicate allegations, not reduced to conviction, of obscenity violations without allowing, post-arrest, a prompt adversary determination of the probable obscenity of items upon which the prosecution is based?

### III.

Is the Indiana criminal RICO statute, unconstitutionally vague in violation of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States?

## LIST OF PARTIES

All parties appear in the caption of this case in this Court.

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

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### OPINION BELOW

The decision of the Indiana Court of Appeals, First District, published at 505 N.E.2nd 504 (1987) appears in the Appendix hereto. (Appendix A) A timely petition for rehearing was filed and denied without opinion. (Appendix B) A timely petition for transfer was filed with the Supreme Court of Indiana and was denied without opinion. (Appendix C)

### JURISDICTION

The decision of the Indiana Court of Appeals was entered on March 31, 1987. A timely petition for rehearing was filed and denied on May 15, 1987. A petition for discretionary transfer

was timely filed with the Indiana Supreme Court and denied on August 17, 1987. This petition was filed within sixty days of that date as required by 28 U.S.C. §2101(d) and Rule 20 (1) of this Court. The Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part that: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## PROVISIONS OF INDIANA CODE INVOLVED

The pertinent provisions of the Indiana Code are presented in Appendix D. The sections included are: I.C. 35-45-6-1 and I.C. 35-45-6-2, I.C. 35-49-2-4 and I.C. 34-4-30.5-1 et seq.

## STATEMENT OF THE CASE

As a result of an investigation into alleged obscenity violation in Howard County, Indiana, law enforcement officers purchased several magazines at stores operated under the names of the corporate defendants and allegedly controlled by the defendant, Ronald Sappenfield. The magazines are sexually explicit. Sappenfield and the corporate defendants were charged with distribution of obscene matter, Class "A" misdemeanors under I.C. 35-49-3-1.

Without obtaining convictions on the misdemeanor charges, the prosecuting attorney alleged a pattern of criminal activity arising from the distribution of the *same material* pursuant to the Indiana Corrupt Business Influence Statute (RICO) Indiana Code 35-45-6-2 et seq. These charges are Class "C" felony charges.

The petitioners moved to dismiss the RICO charges. Petitioners alleged that the RICO statute was unconstitutional in that it was unlawfully vague, denied procedural due process in the context of obscenity, and had an impermissible chilling effect upon the exercise of first amendment rights. Petitioners specifically alleged violations of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. (Appendix E) On September 18, 1985, the trial court found that the RICO statute could not be constitutionally applied to violations of Indiana's obscenity statute. (Appendix F)

The State appealed that decision to the Indiana Court of Appeals which reversed the trial court based upon the Indiana Supreme Court's decision in *Goldsmith, et al, v. 4447 Corporation, et al*, 504 N.E.2d 559 (1987). Petitioner timely filed a petition for rehearing with the Court of Appeals of Indiana which was denied. Thereafter, a timely petition for discretionary transfer was filed with the Indiana Supreme Court which was denied on August 17, 1987.

A Petition for Writ of Certiorari in the *Goldsmith* case has been filed with this Court *sub nom Fort Wayne Books, Inc. v. State of Indiana*. The decision of the Indiana Supreme Court in *Goldsmith* is set out in full in Appendix G.

## REASONS THE WRIT SHOULD BE GRANTED

### I.

### THE INDIANA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, TO-WIT: THAT IT IS CONSTITUTIONALLY PERMISSIBLE TO PROSECUTE AN INDIVIDUAL FOR CRIMINAL RICO VIOLATIONS BASED UPON MERE ALLEGATIONS THAT HE HAS, ON TWO PRIOR OCCASIONS, DISTRIBUTED OBSCENE MATTER.

This case comes before this Court in an era of unprecedented reliance upon the guarantees of the First Amendment. Large numbers of books are published daily. Movie production, television, and radio flourish.

On a local level, a whole new industry, home video, has developed within the past 7 years. Video stores, many "Mom & Pop" operations, abound. Many communities, some reluctantly, tolerate the existence of "Adult" bookstores.

In Indiana, most video stores and adult bookstores, some drugstores and book shops, the owners, employees, suppliers, and landlords alike, are threatened with being labeled "racketeers." Some, like the Petitioner, are threatened with conviction, imprisonment and the forfeiture of their possessions. Law abiding citizens who sell sexually explicit material are now having to decide whether or not to continue business and risk prosecution or modify what they offer for sale in order to accommodate local prosecutors who, without benefit of a jury's determination of "contemporary community standards" can impose the pre- and post-trial sanctions of RICO.

Printed and pictorial matter is presumptively protected. Because of that presumption, one has the freedom to probe the outer limits of that which the community will tolerate. *Heller v. New York*, 413 U.S. 483 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Jenkins v. Georgia*, 418 U.S. 153 (1974). The First Amendment allows the individual to challenge the thinking and the feelings of the community. *Memoirs v. Massachusetts*, *supra*.

Petitioners contend that since they have not been convicted of any obscenity related offenses, they cannot be constitu-

tionally charged with racketeering activities using obscenity as a predicate. To permit such a prosecution will have a substantial and impermissible chilling effect upon the exercise of the first amendment rights of all persons in the State of Indiana. If one, who on two occasions four or five years apart, sells a particular film which, in the eyes of a prosecutor, may subject him to a charge of racketeering, then clearly the seller will have no alternative but to totally eliminate from his inventory any matter which might arguably subject him to prosecution. Since a seller will be forced to limit his inventory to that which is the most unobjectionable to *all* adults, the net result will be to reduce that which is available to adults to material only suitable for children. *Butler v. Michigan*, 352 U.S. 380 (1957). The result will be a substantial and impermissible chilling effect upon the exercise of constitutional liberties throughout Indiana and, indeed, the Nation.

Availability of the Racketeering Statute and its severe sanctions will cause most purveyors of communicative material, to decline to explore the envelope as to what a community will tolerate. Rather, they will adopt a more conservative approach. While this may be satisfactory to those who are uncomfortable with the degree of sexually explicit material commonly tolerated, it will do great disservice to the first amendment and the protection granted thereunder.

## II.

**THE INDIANA COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, TO-WIT: *HELLER V. NEW YORK*, 413 U.S. 483 (1973), SPECIFICALLY, THAT ONE CHARGED WITH CRIMINAL RICO VIOLATIONS, BASED UPON PREDICATE OBSCENITY OFFENSES NOT REDUCED TO CONVICTION, IS NOT ENTITLED TO A PROMPT ADVERSARY HEARING ON THE PROBABLE OBSCENITY OF THE MATTER UPON WHICH THE PROSECUTION IS BASED.**

Under the Indiana obscenity statute, specifically I.C. 35-49-2-4, individuals charged with violations of the statute are

accorded an opportunity for an adversarial hearing for the purpose of determining probable obscenity of materials. Such hearing is statutorily required within ten (10) days after seizure of the material. This hearing is required by the Constitution. *Heller, v. New York*, 413 U.S. 483 (1973); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964). However, because the defendants herein have been charged under the Indiana RICO Statute, the State has effectively denied them the constitutional protections and due process guarantees that the Constitution requires.

The procedures authorized by the Indiana Supreme Court in *Goldsmith v. 4447 Corporation, supra*, will centralize the power to control the availability of sexually explicit materials in the hands of a prosecutor and the most conservative judge in a particular community. Availability of an ex parte hearing for probable cause has a significant chilling effect in a first amendment context. *Freedman v. Maryland*, 380 U.S. 51 (1965); *Heller, supra*.

This Court has, on several occasions, been confronted with circumstances where a properly instructed trial jury has convicted an individual for distributing obscene matter which this Court later determined was not obscene. (e.g. *Carnal Knowledge, Jenkins v. Georgia, supra.*) If First Amendment protections break down in the context of a trial, clearly this Court must recognize that in the context of an ex parte proceeding, the chances of a much greater distortion are obvious.

## III.

### (A)

### THE INDIANA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A MANNER CONTRARY TO THE DECISIONS OF THIS COURT, TO-WIT: THAT THE STATUTORY DEFINITION OF THE INDIANA CRIMINAL RICO STATUTE AS APPLIED TO UNPROVED ALLEGATIONS OF OBSCENITY VIOLATIONS IS NOT UNCONSTITUTIONALLY VAGUE IN THE FOLLOWING RESPECT: THE REQUIRED SCIENTER.

Petitioners contend that the RICO Statute as applied to the Indiana obscenity statute, I.C. 35-45-6-2, et seq., is constitutionally deficient for the lack of the required element of scienter.

The Petitioners are charged with violating I.C. 35-45-6-2(a)(3), which provides in relevant part that a person commits the offense of "corrupt business influence":

> "who is employed by or associated with an enterprise, and who knowingly or *intentionally conducts or otherwise participates* in the activities of that enterprise through a pattern of racketeering activity . . ." (Emphasis added.)

I.C. 35-45-6-2(a)(3) requires only that a person "knowingly or intentionally" act in violation of the statute. Similarly, I.C. 35-49-3-1, the statutory basis for the predicate acts, only requires that a person "knowingly or intentionally" act in violation of the statute. On its face, therefore, these provisions fail to require scienter absolutely. A person, pursuant to these statutes, may be charged for associating intentionally but not with knowledge, and thus this statute may be applied contrary to this Court's pronouncements in *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974).

The critical importance of the scienter requirement in freedom of speech cases was first enunciated by the Court in *Smith v. California*. The Court said:

> *"By dispensing with any requirement of knowledge of contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter.* For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of scienter that: 'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.' [citations omitted]. And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. *The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.* Through it, the distribution of all books, both obscene and not obscene, would be impeded." (Footnotes omitted and emphasis added.) *Smith v. California*, 361 U.S. at 153-154.

Inherent vagueness and ambiguities exist in RICO Statute I.C. 35-45-6-2, principally sub-section (a) (3) therein. The ambiguities are apparent. The statute may be fairly interpreted to read that one is subject to these provisions for "knowing or intentional conduct" or for "knowingly or intentionally" otherwise participating. Alternatively, the statute may be interpreted to read that one is subject to these provisions who "knowingly or intentionally conducts" the proscribed activities

or if such person "otherwise participates" in the proscribed activities. For example, may a landlord be liable for knowingly leasing space to a video store that openly rents sexually explicit materials to the adult public? Does a power company intentionally providing electric service thereby participate in the activities of the enterprise and subject itself to criminal liability? Being subject to these interpretations, I.C. 35-45-6-2 (a)(3) is impermissibly vague and violative of the United States Constitution, as persons of common intelligence must necessarily guess as to the meaning of this provision. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. Cincinnati*, 402 U.S. 611 (1971).

(B)

**THE INDIANA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A MANNER CONTRARY TO THE DECISIONS OF THIS COURT, TO-WIT: THAT THE STATUTORY DEFINITION OF THE INDIANA CRIMINAL RICO STATUTE AS APPLIED TO UNPROVEN ALLEGATIONS OF OBSCENITY VIOLATIONS IS NOT UNCONSTITUTIONALLY VAGUE IN THE FOLLOWING RESPECT: THE DEFINITION OF "PARTICIPATION IN."**

Several Justices of this Court have recognized that the definition of obscenity announced in *Miller v. California*, 413 U.S. 15 (1973) contains within it several intentionally vague elements. *Pope v. Illinois*, _____ U.S. _____, 107 S.Ct. 1918 (1987). Practical experience tells us that it is, in the context of a trial, often difficult to measure "contemporary community standards," or to determine what "appeals to a prurient interest."

In the context of obscenity, the Indiana RICO Statute adds another layer of vague definitions, increases the penalties, and imposes severe sanctions in the form of forfeiture and padlocking.

The RICO statute defines a pattern of racketeering activity as:

> "at least two incidents of racketeering activity of predicate offenses that have the same or similar intent, result, accomplice, victim, or method of commission *or* that are otherwise related by distinguishing characteristics that are not isolated incidents."

As a practical matter, every store, from corner drug or video to adult bookstore, which sells any form of sexually explicit materials, risks prosecution under this statute. Each time a drugstore sells *Penthouse*, it risks being labeled a racketeer if a local prosecutor thinks that he can, ex parte, convince a Judge there is probable cause to believe the material is obscene. Each time a video store rents a sexually explicit movie to a customer, it arguably commits a predicate offense. Each sale is similar in that the intent is the same; profit. The result is the same; a customer has left with an item he or she wanted. The method of commission is the same; the item was taken from the shelf and given to the customer for money. Thus, any two sales of sexually explicit material within 5 years risk raising the local video store, drugstore, or adult bookstore to the level of a "racketeering activity."

The RICO statute thus makes criminal the "employment or association" with a completely lawful business. The statute's concept of "participation in" is such that one who is employed by a lawful business may, based upon apparently lawful acts, rise to the level of a racketeer.

The constitutional requirement of precision and clarity proceeds from the concept that an individual ought to be adequately warned that sanctions will attach to future conduct he might be contemplating, and that such warning may not issue in a form that persons of common intelligence must necessarily guess as to its meaning and differ as to its application. *Papachristou v. City of Jacksonville*, *supra*; *Coates v. Cincinnati*, supra. See also, *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926); *Winters v. New York*, 333 U.S. 507 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Simply stated, a criminal statute is vague when it fails to inform persons of ordinary intelligence what their conduct must be in order to avoid violating the law.

Stricter standards of precision are required where a regulation is capable of reaching expression protected by the First Amendment. As stated in *Smith v. Goguen*, 415 U.S. 566 (1974), at 572-573:

> ". . . The due process doctrine of vagueness . . . incorporates notions of fair notice of warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by a narrowing state court interpretation is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts . . ."

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972) at 108-9, this Court stated:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to streer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

## CONCLUSION

For all the foregoing reasons, Petitioners request that a Writ of Certiorari issue to the Indiana Court of Appeals, First Division.

Respectfully submitted,

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# Appendix

## APPENDIX A

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

| | | |
|---|---|---|
| STATE OF INDIANA, | ) | |
| | ) | |
| *Plaintiff-Appellant,* | ) | |
| | ) | |
| vs. | ) | No. 34A02-8603-CR-74 |
| | ) | |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | |
| FANTASY ONE, INC. and | ) | |
| FANTASY TWO, INC., | ) | |
| | ) | |
| *Defendants-Appellees.* | ) | |

**APPEAL FROM THE HOWARD SUPERIOR COURT**
**DIVISION I**
**The Honorable Dennis H. Parry, Judge**
**Cause No. 2630**

RATLIFF, C.J.

### STATEMENT OF THE CASE

The State of Indiana appeals the dismissal of two informations charging the Sappenfields with violation of Indiana Code section 35-45-6-2, Indiana's RICO statute. We reverse

### FACTS

As a a result of an investigation into adult bookstores in Howard County, law enforcement officers purchased several magazines at two stores allegedly owned or operated by Ronald

and Connie Sappenfield. The magazines contained graphic photographs of heterosexual and homosexual activity. The Sappenfields were charged with violating Indiana's obscenity statute, Indiana Code section 35-49-1-1 *et seq*. Several Howard County residents examined the magazines and gave verified statements to the effect that the magazines were obscene. The Sappenfields have not been tried or convicted on any of the six allegations of distributing obscene matter. The prosecuting attorney also alleged a pattern of criminal activity arising out of the distribution of the same obscene matter pursuant to the Indiana Corrupt Business Influence statute (RICO), Indiana Code section 35-45-6-2.

On June 4, 1985, the Sappenfields moved to dismiss the two counts based on Indiana's RICO statute arguing RICO was unconstitutionally vague and violative of the 14th Amendment. On September 18, 1985, the trial court found that RICO could not be constitutionally applied to violations of Indiana's obscenity statute. Thereafter, the state perfected this appeal.

## ISSUE

Whether the trial court erred in granting the Sappenfields' motion to dismiss in ruling that Indiana's RICO statute, I.C. §35-45-6-2, as it applies to a violation of Indiana's obscenity statute, I.C. §35-49-1-1 *et seq*., is unconstitutionally vague and violative of the Due Process Clause of the Fourteenth Amendment.

## DISCUSSION AND DECISION

The Indiana RICO statute, as enacted by the legislature in 1980, is essentially patterned after the federal anti-racketeering laws. *See Alvers v. State* (1986), Ind. App., 489 N.E.2d 83, *trans. denied;* 18 U.S.C.A. sections 1961-1986 (West 1984). Indiana Code section 35-45-6-2(a) states:

> "A person:
>
> (1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of

racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an interprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony."

"'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of any of several enumerated predicate offenses, including violation of the obscenity statute. Indiana Code section 35-45-6-1. A "pattern of racketeering activity" means "engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission. . . ." I.C. §35-45-6-1. The purpose of the federal RICO statute, after which the Indiana statute is patterned, is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States* (1983), 464 U.S. 16, 26, 104 S. Ct. 296, 302, 78 L. Ed. 2d 17, 26.

Recently, in a factually similar case, the Indiana Supreme Court addressed the very issue before us today:

> "Before addressing the questions certified for interlocutory appeal, we must analyze the issue found by the Court of Appeals to be dispositive, namely whether the RICO/CRRA statutory scheme as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. That analysis begins with the proposition that an act of the legislature must be afforded a presumption of constitutionality. *Ruge v. Kovach* (1984), Ind., 467 N.E.2d 673; *Johnson v. St. Vincent Hospital, Inc.* (1980), 273 Ind. 374, 404 N.E.2d 585."

*4447 Corp. v. Goldsmith* (filed March 2, 1987), Ind. No. 29S04-8703-CV-270, slip op. at 7.

> "Both the federal and Indiana RICO statutes delineate predicate offenses which underlie an allegation of a pattern of racketeering activity. The Indiana RICO statute as originally enacted included obscenity violations as a predicate offense. While the federal RICO statute did not initially contain the predicate offense of obscenity violations, in 1984 Congress amended the statute to include as a predicate offense 'any act . . . involving . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year.' 18 U.S.C.A. §1961(1)(A) (West Supp. 1986). The statute was further amended to include 'any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter).' 18 U.S.C.A. §1961(1)(B) (West Supp. 1986).
>
> "Given the clear legislative purpose in enacting these anti-racketeering statutes, that purpose, in the context of alleged obscenity violations, cannot be specifically construed to represent an attempt to restrain the sale or distribution of expressive materials. The legislative attack on racketeering activity is not, as appellants contend, merely a semantic device intended to circumvent well-established First Amendment doctrine.
>
> "Obscenity does not come within the area of constitutionally protected speech or press. *Miller v. California* (1973), 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419; *Roth v. United States* (1957), 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. Our legislature, as has Congress, has determined that obscenity violations should be one of the underlying offenses which may constitute racketeering activity as defined in the RICO statute. We must take heed of that legislative intent.
>
> "We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications."

*4447 Corp.*, slip op. at 9-10.

> "We hold that the RICO/CRRA statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments of the United States Constitution."

*Id.* at 12. The Supreme Court went on to determine that prior convictions for the underlying offenses are not required to prove a pattern of racketeering activity under I.C. §35-45-6-2.

In light of this recent supreme court decision, the State's position is clearly correct. Indiana's RICO statute is not unconstitutional as applied to the State's obscenity statute. Therefore, the trial court erred in granting the Sappenfields' motion to dismiss regarding the counts based on the RICO statute.

We therefore reverse the judgment and remand for proceedings consistent with this opinion.

ROBERTSON, J. and NEAL, J., concur.

## APPENDIX B

STATE OF INDIANA -V- SAPPENFIELD, RONALD & CONNIE

You are hereby notified that the COURT OF APPEALS has on this day 5/15/87 APPELLEE'S PETITION FOR REHEARING DENIED. GEORGE B. HOFFMAN, JR., ACTING CHIEF JUDGE.

WITNESS my name and the seal of said Court, this 15th day of MAY, 1987.

/S/ Daniel Heiser

Clerk Supreme Court, Court of Appeals and Tax Court

## APPENDIX C

STATE OF INDIANA -V- SAPPENFIELD, RONALD & CONNIE

You are hereby notified that the COURT OF APPEALS has on this day 8/17/87 APPELLEE'S PETITION TO TRANSFER IS HEREBY DENIED, WITHOUT OPINION. SHEPARD, C.J. DEBRULER, J. VOTES TO GRANT.

WITNESS my name and the seal of said Court, this 17th day of AUGUST, 1987.

/S/ Daniel Heiser

Clerk Supreme Court, Court of Appeals and Tax Court

## APPENDIX D

### 35-45-6-1 Definitions

Sec. 1. As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a Class C felony (IC 35-42-2-1), kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); official misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling

(IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). *As added by Acts 1980, P.L.199, SEC.2. Amended by P.L.190-1984, SEC.1.*

**35-45-6-2 Corrupt business influence**

Sec. 2. (a) A person:

(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony. *As added by Acts 1980, P.L.199, SEC.2.*

**35-49-2-4 Adversary hearing; application for; preliminary determination**

Sec. 4. (a) Within ten (10) days after:

(1) matter is obtained by seizure or by purchase under this article; or

(2) the defendant is arrested under this article;

whichever is later, and before trial, the state, the defendant, an owner, or any other party in interest of any matter seized or purchased may apply for and obtain a prompt adversary hearing for the purpose described in subsection (b).

(b) At the adversary hearing, the court shall make a preliminary determination of whether the matter is:

(1) probably obscene; or

(2) probably harmful to minors.

*As added by P.L.311-1983, SEC.33.*

## Chapter 30.5. Civil Remedies for Racketeering Activity.

### 34-4-30.5-1 Definitions

Sec. 1. As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) is the object of corrupt business influence (IC 35-45-6-2); or

(2) has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. *As amended by P.L.308-1985, SEC.1.*

### 34-4-30.5-2 Injunctive relief from corrupt business influence; action by prosecuting attorney

Sec. 2. The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) order a defendant to divest himself of any interest in any enterprise or real property;

(2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) order the dissolution or reorganization of any enterprise;

(4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. *As added by Acts 1980, P.L.199, SEC.1.*

**34-4-30.5-3 Action for forfeiture of property incident to corrupt business influence; orders for forfeiture and seizure**

Sec. 3. (a) The prosecuting atorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred. *As added by Acts 1980, P.L.199, SEC.1*

**34-4-30.5-4 Seizure of property subject to forfeiture; requisites; custody; limitation of actions**

Sec. 4. (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) the seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter;

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) place the property under seal;

(2) remove the property to a place designated by the court; or

(3) require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to repleven,[1] but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 of this chapter. If an action is not filed within 180 days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner. *As added by Acts 1980, P.L.199, SEC.1.*

**34-4-30.5-5 Injunctive relief and damages from corrupt business influence; actions by aggrieved persons; jury trial; right to forfeited property**

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

**34-4-30.5-5 Injunctive relief and damages from corrupt business influence; actions by aggrieved persons; jury trial; right to forfeited property; state as aggrieved person**

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may

order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) an amount equal to three (3) times his actual damages;

(2) the costs of the action;

(3) a reasonable attorney's fee; and

(4) any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. *As amended by P.L.308-1985, SEC.2.*

**34-4-30.5-6 Collateral estoppel; criminal proceeding**

Sec. 6. In any action brought under this chapter, the prin-

ciple of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. *As added by Acts 1980, P.L.199, SEC.1.*

## APPENDIX E

IN THE HOWARD SUPERIOR COURT
DIVISION 1

STATE OF INDIANA )
) SS
COUNTY OF HOWARD )

| | | |
|---|---|---|
| STATE OF INDIANA, | ) | |
| | ) | |
| *Plaintiff,* | ) | |
| | ) | |
| v. | ) | CAUSE NO. 2630 |
| | ) | |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | |
| FANTASY ONE, INC. and | ) | |
| FANTASY TWO, INC., | ) | |
| | ) | |
| *Defendants.* | ) | |

### MOTION TO DISMISS

Comes now the defendant, by counsel, and moves the court to dismiss Counts IV and VIII of the information herein for each of the following reasons:

1. The statute upon which the information is based is unconstitutional, as applied in this case, in that said statute, as applied, violates the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

9. The law, as applied, is unconstitutional, in that the defendant was never accorded an opportunity for a prompt hearing on probable obscenity either prior to, or subsequent to, the seizure of the materials, as guaranteed by the Fifth and

Fourteenth Amendments to the Constitution of the United States of America.

Respectfully submitted,

/S/ Richard Kammen

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*Counsel for Defendant*

## MEMORANDUM OF LAW

Specifications 1, 2, and 8 of the Defendant's Motion to Dismiss are based upon the failure of the State of Indiana, in both the drafting of the criminal statute under which the defendant stands charged and the application of this statute, to follow the requirements of the First Amendment to the Constitution of the United States of America, and Article I, Sections 3, 4, 9, 12, 13, 14, 16, 17, 21, 23, and 31 of the Constitution of the State of Indiana.

Several things are clear. All printed matter, all movies, and all publications of any sort are clothed with the presumption that they are legitimate and protected by the First Amendment to the Constitution of the United States of America. *Doran v. Salem Inn*, 422 U.S. 922; *Salem Inn, Inc. v. Frank*, 522 F.2d 1045; *Southeastern Promotions Limited v. Conrad*, 420 U.S. 546 (1975); *Lee Art Theatre v. Virginia*, 392 U.S. 636; *Interstate Circuit, Inc., v. City of Dallas*, 390 U.S. 676; *Jacobellis v. Ohio*, 378 U.S. 184; *Joseph Burstein, Inc. v. Wilson*, 343 U.S. 495; *Roaden v. Kentucky*, 413 U.S. 57; *Bantum Books v. Sullivan*, 372 U.S. 58; *Quantity of Books v. Kansas*, 378 U.S. 205. Even if an individual is arrested and charged with distribution of obscene matter, the matter is still cloaked with the presumption that it is protected, and remains so cloaked unless and until the individual charged is in fact convicted. *Heller v.*

*New York*, 413 U.S. 483. See also *United States v. Thirty-seven Photographs*, 402 U.S. 363; *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Freedman*, the United States Supreme Court said:

> "Because only a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 402 U.S. at 367. See also *Bount v. Rizzi*, 400 U.S. 410, *Tittel Film Corp. v. Kusek*, 390 U.S. 139.

A judgment that material is in fact obscene does not taint similar items. A judgment that material is obscene taints only that particular item. *Quantity of Books v. Kansas*, 378 U.S. 205; *Bantum Books v. Sullivan*, 83 S.Ct. 639; *Organization for a Better Austin v. Keefe*, 402 U.S. 415; *Carol v. President and Commissioner of Princess Anne County*, 393 U.S. 175.

Similarly, businesses which are convicted of selling obscene material may not be closed, nor may a permit or license be revoked or denied. *Universal Amusement Company v. Vance*, 100 S.Ct. 1156 (1980), 587 F.2d 159; *People ex rel. Busch v. Projection Room Theatre*, 550 P.2d 600 (1976); *General Corp. v. Sweeten*, 320 South 2d 668 (Alabama, 1975); *Kansas v. Motion Picture Entitled "The Bet"*, 219 Kansas 63 (1976); *Gulf States Theatres of Louisiana v. Richardson*, 287 S.2d 480 (Louisiana, 1974); *New Riviera Arts Theatre v. Davis*, 219 Tennessee 652 (1967); *Society to Oppose Pornography, Inc. v. Thevis*, 255 S.2d 876; *Giarrusso v. D'Iberville Gallery*, 295 S.2d 891; *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind. App. 1973); *Sanders v. State*, 203 S.E.2d 152 (1974); *State ex rel. Field v. Hess*, 540 P2d; *Commonwealth ex rel. Davis v. Van Emberg*, 347 Atl.2d 712; *City of Minot v. Central Avenue News, Inc.*, 308 N.W.2d 851; *Parish of Jefferson v. Bayou Landing Limited, Inc.* 305 S.2d 158 (1977); *Nihiser v. Sendak*, 405 F.Supp. 1124; *Yuclan Enterprises, Inc. v. Arre*, 488 F.Supp. 820; *Avon Forty-Second St. Corp. v. Meyerson*, 352 F.Supp. 994; *Oregon Book Mark Corp. v. Shrunk*, 321 F.Supp. 639; *City of Seattle v. Bitner*, 505 P.2d 126.

Finally, because of its paramount place in the constellation of constitutionally protected freedoms, statutes which touch upon the exercise of First Amendment rights are carefully scrutinized, and if, on examination, they hinder the execise of First Amendment rights, they are unconstitutional, both under Federal and State Constitutions. *State v. Kubel*, 172 N.E.2d 45.

*State v. Kubel*, *supra.*, provides an interesting analysis. In that case, the Indiana Supreme Court said:

> "Article I, Section 9, of the Constitution of Indiana provides 'no law shall be passed restraining the right to speak, write, or print freely, on any subject whatsoever; but for the abuse of that right every person shall be responsible.'
>
> The State may, in the proper exercise of the police power, prevent the sale and distribution of obscene matter, but when this is attempted in a manner which tends to restrict the right of free speech or expression, then the right of free speech guaranteed by Article I, Section 9, must be weighed in the balance against the requirement of the public safety and welfare which are asserted by the restriction sought.
>
> When this test is applied to the situation with which we are now confronted, the scales weigh in favor of the right to free speech and free expression.
>
> The imposition of a strict liability by the statute here has the effect of restricting the free interchange of thought and opinion by requiring a bookseller to act at his peril in the sale and distribution of books and periodicals, whether obscene or not obscene. Under such circumstances, the bookseller will restrict and limit the books and periodicals entirely free of any possibility of contaminating matter, which might cause his summary arrest merely for having such items in his store. This type of censorship would result in preventing the sale and distribution of many books and periodicals which a court might finally determine not to be obscene, thereby imposing a censorship exceeding the boundaries which are pre-

scribed by the limits beyond which the police power cannot operate."

When analyzed under the foregoing principles, it is very obvious that, as applied to businesses selling materials protected by the First Amendment, the corrupt business practices act is unconstitutional and violative of the First Amendment of the Constitution of the United States, and Article I, Section 9 of the Constitution of the State of Indiana in several different respects.

It is clear that, absent a conviction for distribution of obscene matter, the statute in question is patently unconstitutional.

Moreoever, the statute is unconstitutional when applied to First Amendment related businesses, because it provides none of the required protections guaranteed by the First Amendment to the Constitution of the United States of America.

Because printed and pictorial matter is protected, one who sells such matter has the freedom to probe the outer limits of that which the community will tolerate. *Heller v. New York*, *supra.*, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Jenkins v. Georgia*, 418 U.S. 153 (1974). The First Amendment allows the individual to challenge the thinking and the feelings of the community. *Memoirs v. Massachusetts*, *supra*.

Consequently, before an individual may be brought to trial as a result of an allegation that material which he has sold violates the First Amendment, he must be accorded an opportunity to show the judge that the material is within the ambit of the First Amendment. This is required by statute. IC 35-30-10.1-1, *et seq*. See also *Heller v. New York*, *supra; Quantity of Books v. Kansas*, *supra.; Marcus v. Search Warrant*, *supra*. Because petitioner has never been accorded such an opportunity, and could not be accorded such an opportunity under this particular statute, the statute, as applied and as written, is unconstitutional as applied to a First Amendment business.

Additionally, because the defendant has not been convicted of distribution of obscene matter, he submits that he cannot be constitutionally charged with racketeering. To allow this pros-

ecution to continue will have a substantial "chilling effect" upon the exercise of First Amendment rights. Perhaps, necessarily, the statute defining obscenity is couched in vague terms. Individual standards may vary from area to area. IC 35-30-10.1-1, *et seq.* However, if one, who on two occasions four or five years apart, sells a a particular book or material, or two similar books or materials which, in the eyes of some prosecutors, can subject him a charge of corrupt business influence, then clearly acceptable. The net result will be to reduce that which is available to adults to material only suitable for children. (Prohibited by *Butler v. Michigan*, 352 U.S. 380, 1957). The result will be a substantially "chilling effect" upon the exercise of constitutional liberties throughout the State of Indiana.

IC 35-45-6-2 must be reviewed against this constitutional background. This statute provides:

(a) A person:

(1) who has knowingly or intentionally received any proceeds *directly or indirectly derived* from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise *participates in the activities of that enterprise* through a pattern of racketeering activity;

commits corrupt business influence, a Class C Felony.

Racketeering activity, as defined by IC 35-45-6-1, includes, among other things, violations of any of the securities laws, violations of certain prohibitions against sale of obscene materials, promoting prostitution, promoting professional gambling, drug offenses, and the like.

The complexity of IC 35-45-6-2 is readily apparent. When the individual components of this statute are analyzed, its unconstitutionality as a whole is readily apparent.

Where there is ambiguity in a criminal statute, all doubts are resolved in favor of the defendant. *U.S. v. Bass* (1971), 404 U.S. 336.

Of primary import is the question of the required scienter. The statute appears to prohibit the doing or intentional receipt of proceeds, either directly or indirectly derived from a pattern of racketeering activity. The statute does not require, however, that the individual receiving those proceeds be "a member" of the racketeering organization. Thus, one who sells eggs to a restaurant known to be controlled by a racketeering activity, might render himself liable under this statute. This is especially so if, having saved the profits from the egg business, he buys a home or continues to operate his completely legal sole proprietorship. Similarly, one rendering unquestionably permissible services to a business accused of racketeering might find himself caught up under this statute.

Because men of ordinary intelligence could not see, at the time they do certain acts, that they might be violating the law, the statute is unconstitutional. Similarly, the clerk at a liquor store, who happens to unknowingly deliver to a state legislator a bribe, is employed or associated with an enterprise and does knowingly or intentionally participate in the activities of that enterprise through a pattern of racketeering activity, even though he may have been unaware of what he was doing.

Clearly, as written, the scienter element under IC 35-45-6-2, is not limited to activity undertaken to facilitate illegal

activities of a racketeering enterprise. This is important. A racketeering enterprise may engage in many activities, some of which are not, in and of themselves, illegal.

Therefore, the defendant submits that the statute fails to specify, with reasonable clarity, specifically what kinds of activity it prohibits and is therefore unconstitutionally vague. It is, of course, fundamental that no one may be required, at peril of life, liberty or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. *Lanzetta v. New Jersey* (1939), 306 U.S. 451.

The defendant has previously alluded to a second problem, which is that there is no requirement that an individual know that his actions are a pattern of racketeering activity. As indicated, a seller, one who is a vendor to an enterprise which happens to be participating in racketeering activities, may be obtaining proceeds indirectly from said activities, and may find himself within the ambet of this statute.

The vague language of the statute thus may subject an individual to criminal sanctions for activities, the legality of which cannot be determined solely by the actor's conduct, but must be determined by factors which a person may be unaware of at the time. Such a statute violates due process. It lacks the ascertainable standards that give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *U.S. v. Harris* (1954), 347 U.S. 612. A second example is perhaps appropriate. As discussed elsewhere in this memorandum, IC 23-2-1, *et seq.*, provides several hundred different acts, the doing of which or the failure to do, might constitute a criminal violation.

One who is a secretary for a business which is systematically violating the technical aspects of IC 23-2-1, is deriving, indirectly, proceeds from a pattern of racketeering activity. Should that individual choose to purchase a home, or perhaps rent an apartment (a lease is an interest in real property), might find themselves subjected to prosecution under this statute. Yet, until their arrest, their conduct would have been so innocent that they would have had no way of knowing, in any manner, that they were violating the law.

Unlike traditional forms of conspiracy, which require active participation, the racketeering statute provides mere employment or "association." Additionally, the statute fails in any manner to distinguish between the principles in the racketeering business and mere employees or associates. As such, the statute is unconstitutionally vague.

Finally, the term "association" does not lend itself to a sufficiently precise definition to be a permissible standard of criminal liability.

Friends are often associates. Clearly a secretary is associated with a business. Clearly a vendor may be associated with a business. All of those may have knowingly received proceeds directly or indirectly derived from a pattern of racketeering activity. Yet, their conduct may have been completely innocent.

Finally, the term "pattern of racketeering activity" is unconstitutionally vague. The statute defines "pattern of racketeering activity" as:

> "at least two incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, method of commission, or that are otherwise interrelated by distinguising characteristics that are not isolated incidents. However, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five years after a prior incident of racketeering activity.

When analyzed, it is obvious that this definition is not constitutionally acceptable. For example, does the phrase "two incidents of racketeering activity that have the same or similar intent" mean traditional criminal scienter, such as knowing or wilful, or the intent to accomplish a certain goal, *e.g.*, make money. The same problem exists with the phrase "result, accomplice, victim, or method of commission." What is a similar result? What is a similar accomplice? What is a similar victim?

One who sells a copy of "Hustler" on September 1, 1980, and who, on September 1, 1984, sells a second copy of "Hustler", may have been deemed to have violated IC 35-30-10.1-2 (Distribution of Obscene Matter). Those incidents, while seemingly isolated, are not so isolated as to be outside the prohibition of the racketeering activity. While four years might seem to be isolated apparently in Indiana this is not the case. They would probably have the same or similar intent; i.e., to sell the magazine; the same or similar result, i.e., to derive proceeds from that sale; and the same or similar method of commission, i.e., handing the magazine across a counter to a customer and taking his money. Yet, the clerk who sold these two issues of "Hustler" would in no manner have any reason to think that he was elevated to the status of a senior member of a racketeering organization.

Respectfully submitted,

/S/ Richard Kammen

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*Counsel for Defendant*

## APPENDIX F

IN THE HOWARD SUPERIOR COURT

1985 TERM

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

STATE OF INDIANA

vs.

RONALD W. SAPPENFIELD, CONNIE SAPPENFIELD, FANTASY ONE, INC. AND FANTASY TWO, INC.

CRIMINAL CAUSE NO. 2630

### RULING ON MOTION TO DISMISS

The defendants are charged in Counts IV & VIII with violation of Indiana Code 35-45-6-2(3). It reads as follows:

> "a person: (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits Corrupt Business Influence, a class C felony."

The defendants are charged with two (2) counts of Racketeering by the sale or distribution of obscene material as defined in Indiana Code 35-30-10.1-2.

"Racketeering activity" is defined as follows:

> ". . . .to commit, to attempt to commit, or to conspire to commit a violation. . . .IC 35-30-10.1-2. . . ."
>
> "Pattern of Racketeering activity means engaging in at least two (2) INCIDENTS (emphasis supplied) of racketeering activity. . . ."

The Constitution of the United States of America, by its First Amendment, offers protection to printed matters, movies and publications by the presumption that they are legitimate.

There must be a judicial determination, in an adversary proceeding, that these items are outside the scope of protection before a valid restraint may be imposed upon this fundamental right.

The defendant argues various points in support of their motion to dismiss and requests of this court a close scrutiny of this statute because of the possible "chilling effect" upon First Amendment rights.

The defendants in this cause have not been convicted of sale or distribution of obscene material. In fact, they have been charged with such an offense simultaneously herewith. The material alleged to have been sold or distributed has yet to be determined to be prohibited or protected. No trial has taken place for a jury to determine the "prevailing community standard".

The Racketeer Influence and Corrupt Organization Statute (R.I.C.O.) allows for the prosecutor to determine that the material violates current standards of the community and that merely purchasing on two (2) occasions fulfils the statutory requirement of "two incidents" of activity.

What constitutes "two incidents of *activity*"? Certainly it must be more than merely distributing or selling written material which has not been determined by a judicial proceeding to be unlawful.

In *Conolly v. General Construction Co.* (1926) 269 U.S. 385, it is stated

> "The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the solid rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Therefore, this Court finds the defendants' argument is well founded and this Court now finds that Indiana Code 35-45-6-2(3), as it applies to a violation of Indiana Code 35-30-10.1-2, is unconstitutionally vague and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, and therefore grants the defendants' Motion to Dismiss as to Counts IV and VIII.

DATED THIS 18th DAY OF SEPTEMBER, 1985.

/S/ DENNIS H. PARRY

JUDGE, HOWARD SUPERIOR COURT

## APPENDIX G

**4447 CORPORATION, et al., Appellants,**

**v.**

**Stephen GOLDSMITH, Appellee.**

**FORT WAYNE BOOKS, INC., et al., Appellants,**

**v.**

**STATE of Indiana and Stephen M. Sims, Appellees.**

**No. 29S04-8703-CV-270.**

Supreme Court of Indiana

March 2, 1987.

### CIVIL PETITION TO TRANSFER

GIVAN, Chief Justice.

These consolidated causes are before the Court on appellees' Petition to Transfer. Appellees filed similar actions in which they allege the various defendants, owners and operators of adult bookstores, have engaged in racketeering activity as defined in the Racketeer Influenced and Corrupt Organizations Act (RICO), Ind. Code § 35-45-6-1 *et seq.* Appellees seek various remedies as provided in the Civil Remedies for Racketeering Activity (CRRA) statute, Ind. Code § 34-4-30.5-1 *et seq.*

In both cases the trial court, pursuant to Ind. Code § 34-4-30.5-3(b), entered an *ex parte* order seizing appellants' assets. On interlocutory appeal of the denial of appellant's motions to vacate the seizure orders, a majority of the Court of Appeals, Fourth District, held that the RICO and CRRA statutes constitute facially unconstitutional prior restraints in their application to the predicate offense of obscenity. *4447 Corp. v. Goldsmith* (1985), Ind.App., 479 N.E.2d 578, 592. We grant appellees' petition and thereby vacate the opinion of the Court of Appeals.

In 1980, the legislature enacted the Indiana RICO statute, which is essentially patterned after the federal anti-racketeering laws. *See Alvers v. State* (1986), Ind. App., 489 N.E.2d 83. As set out in Ind. Code § 35-45-6-2(a), a person:

> "(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
>
> (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;"

commits the offense of Corrupt Business Influence, a Class C felony. " 'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of any of a number of enumerated predicate offenses, including violation of the obscenity statute. Ind. Code § 35-45-6-1. A "pattern of racketeering activity" is defined as "engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission. . . ." *Id.*

Under the CRRA provisions, the prosecuting attorney in a county in which the violation occurs may bring an action to enjoin a violation of the RICO statute. Ind. Code § 34-4-30.5-2. If the court finds by a preponderance of the evidence that such a violation has occurred, it may:

> "(1) order a defendant to divest himself of any interest in any enterprise or real property;
>
> (2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) order the dissolution or reorganization of any enterprise;

(4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate." *Id.*

Additionally, pursuant to Ind. Code § 34-4-30.5-3(a), the prosecuting attorney in a county in which any of the property is located "may bring an action for the forfeiture of any property used in the couse of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2." Upon a showing by a preponderance of the evidence that the property in question was so used, the court shall order the property forfeited to the state. *Id.* When a forfeiture action has been filed, the prosecutor may move for an order to have the property subject to forfeiture seized by a law enforcement agency and the court "shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred." Ind. Code § 34-4-30.5-3(b).

The first of the instant cases was commenced on August 1, 1983, when appellee Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit, filed a CRRA action in Marion Circuit Court. The complaint alleged that the three bookstores owned and operated by the individual and corpo-

rate defendants (appellants) comprised an illegal enterprise as defined in Ind. Code § 35-45-6-1 and that appellants had engaged in a pattern of racketeering activity. The predicate offenses alleged were the distribution of obscene matter in violation of Ind. Code § 35-30-10.1-2 (repealed by Acts 1983, P.L. 311, recodified as Ind. Code § 35-49-3-1).

At the same time Goldsmith filed a Verified Petition for Seizure of Property Subject to Forfeiture. In support of the petition, he attached a probable cause affidavit sworn by Detective Thomas R. Rogers of the Indianapolis Police Department. Detective Rogers stated therein that he and other officers had visited the two operating bookstores alleged to be part of the illegal enterprise, where they observed sexually-oriented books, magazines, films and videotapes available for sale or exhibition. The officers purchased four sexually explicit movies which were submitted to the court.

The officers were informed by one of the bookstore employees that a new bookstore, to be known as the Plaza Entertainment Center, was due to open at 4266 West 38th Street in Indianapolis on August 11, 1983. One of the officers visited that location and spoke to a construction worker, who informed the officer that sexually-oriented materials would be available for sale. In conclusion, Detective Rogers alleged that numerous investigations had led him to the reasonable belief that the two existing adult bookstores were part of a single enterprise and that the enterprise was preparing to open a new bookstore which would sell and exhibit obscene materials.

Based on those representations, the trial court on August 1 found probable cause to believe violations of the RICO statute existed and entered an *ex parte* order compelling the Indianapolis Police Department to seal the unopened bookstore. The court also ordered appellants to preserve certain business equipment located at the two operating bookstores and to list their other property. Trial was set for 72 hours later.

On August 4 appellants filed motions to dismiss the complaint and to vacate the seizure order, based in part on their contention that the order and the RICO statute abridged the

exercise of the freedoms of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution. The cause was continued on appellants' motions and later transferred to Hamilton Circuit Court, where on September 8 Goldsmith filed an amended complaint seeking a number of CRRA remedies.

On December 21, 1983, the trial court denied appellants' motions to dismiss the complaint and to vacate the August 1 seizure order. The court, pursuant to Ind. R. App. P. 4(B)(6), then certified for interlocutory appeal the question of whether a seizure order may issue when based on obscenity violations not yet ligitated.

On March 19, 1984, appellee Stephen Sims, Prosecuting Attorney for the Thirty-Eighth Judicial District, filed a CRRA action in the Allen Circuit Court. The complaint alleged that the three adult bookstores owned and operated by the various defendants (appellants) comprised an illegal enterprise and that appellants had engaged in a pattern of racketeering activity, the predicate offenses being the distribution of obscene materials. Cited in the complaint were appellants' thirty-nine obscenity convictions entered between June of 1981 and March of 1984.

Sims simultaneously filed a Verified Petition for Seizure of Property Subject to Forfeiture. Attached to the petition was a probable cause affidavit sworn by Officer Charles Dennis of the Ft. Wayne Police Department. The affidavit alleged the thirty-nine prior obscenity convictions and related that police officers had observed materials believed to be obscene during recent surveillance of the bookstores. Also submitted to the court were taped descriptions by police officers of the contents of the materials.

That same day the court entered an *ex parte* order allowing the Ft. Wayne Police Department to seize the contents of the three bookstores. On March 23 appellants moved to vacate the order and in the alternative sought a modification of the order which would allow them to continue the sale and distribution of the materials in the bockstores. Those motions were premised

on appellants' allegation that the order constituted a constitutionally impermissible prior restraint. The motions were denied on March 29.

After police officers on April 3 hauled away the contents of the bookstores, appellants filed an Emergency Motion for Inventory of Property Removed and/or Return of Property. That motion was also denied. On April 18 the trial court certified two questions for interlocutory appeal: 1) whether an application for seizure upon probable cause shown *ex parte* as provided by Ind. Code § 34-4-30.5-3(b) violates due process guarantees provided by the Indiana and United States Constitutions; and 2) whether the seizure order, which is based upon prior criminal convictions, is a violation of the First Amendment.

Thus these cases are similar, with several important factual distinctions. In the Marion County case, the predicate obscenity violations were shown by the allegations of the investigating officers, while in the Ft. Wayne case the predicate violations underlying the RICO allegation were shown by proof of prior convictions for violations of the Indiana obscenity statute. The two existing Marion County bookstores were permitted to continue operating pending trial and the unopened store was sealed. The Court of Appeals issued a stay order allowing the store to open. The three bookstores in Ft. Wayne were sealed and the contents were hauled away by the police. Those stores remain closed.

Upon consolidating the two cases, the Court of Appeals determined that its disposition of the interlocutory appeals "require[d] resolution of but a single issue: whether the RICO and CRRA provisions invoked against the defendants abridge the freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution." *4447 Corp., supra* at 583. The court concluded that:

> [T]he challenged RICO/CRRA provisions are unconstitutional on three distinct yet interrelated grounds. First, they operate as a prior restraint which impermissibly impinges upon the dissemination of protected mate-

> rials. Second, these measures fail to comply with the procedural safeguards required even for the suppression of *obscene* materials. Finally, independent of our determination that these statutes operate as an unconstitutional prior restraint, their provisions as they relate to obscenity must fall under the less restrictive means test announced in *United States v. O'Brien* (1968), 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, for the evaluation of allegedly content-neutral state regulation which has an incidental impact upon free expression." *Id* at 585 (original emphasis).

[1] Before addressing the questions certified for interlocutory appeal, we must analyze the issue found by the Court of Appeals to be dispositive, namely whether the RICO/CRRA statutory scheme as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. That analysis begins with the proposition that an act of the legislature must be afforded a presumption of constitutionality. *Ruge v. Kovach* (1984), Ind., 467 N.E.2d 673; *Johnson v. St. Vincent Hospital, Inc.* (1980), 273 Ind. 374, 404 N.E.2d 585.

Appellees argue the purpose of the CRRA remedies is not to suppress speech but rather to compel the forfeiture of assets acquired through racketeering activity; therefore, their actions were not undertaken in an effort to enjoin or restrain any future display or distribution of presumptively protected expressive material. Appellees assert that since any personal property, regardless of its nature, which is derived from racketeering activity could possibly be seized, the seizure orders were not entered because appellants' assets were obscene materials but because there was probable cause to believe they were assets subject to forfeiture.

Appellants contend that the statutory scheme must be analyzed in terms of its effect upon the exercise of First Amendment rights, and in so doing the only conclusion that can be reached is that the statutes as applied to the predicate offense of obscenity constitute an impermissible prior restaint.

Appellants would have us adopt the Court of Appeals' view "that for constitutional purposes, these proceedings must be viewed as the functional equivalent of a nuisance or obscenity action," *4447 Corp., supra* at 597, and cite a number of cases involving state actions found to constitute prior restraints. *See, e.g., Entertainment Concepts, Inc., III v. Maciejewski* (7th Cir. 1980), 631 F.2d 497 (license revocation); *Universal Amusement co., Inc. v. Vance* (5th Cir. 1978), 587, F.2d 159 (nuisance abatement), *aff'd* (1980), 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413; *State ex rel. Blee v. Mohney Enterprises* (1972), 154 Ind. App. 244, 289 N.E.2d 519 (injunction).

To appellants, the word "racketeering" as applied in this context is merely a semantic device to allow the state to "expand its arsenal of weapons designed to suppress obscenity" to include license revocation, padlocking, forfeiture of property used to disseminate obscene matter and similar methods which the courts have historically condemned; consequently, the CRRA remedies constitute a restraint on future expression. We cannot agree.

The purpose of the federal RICO statute, after which the Indiana statute was patterned, is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States* (1983), 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17, 26. Its provisions are to be liberally construed to effectuate its remedial purposes. *United States v. Turkette* (1981), 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246. One of the most important of those remedies is the forfeiture of assets acquired through racketeering activity. *Russello, supra.*

Both the federal and Indiana RICO statutes delineate predicate offenses which underlie an allegation of a pattern of racketeering activity. The Indiana RICO statute as originally enacted included obscenity violations as a predicate offense. While the federal RICO statute did not initially contain the predicate offense of obscenity violations, in 1984 Congress amended the statute to include as a predicate offense "any act . . . involving . . . dealing in obscene matter . . . which is

chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C.A. § 1961(1)(A) (West Supp. 1986). The statute was further amended to include "any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter)." 18 U.S.C.A. § 1961(1)(B) (West Supp. 1986).

Given the clear legislative purpose in enacting these anti-racketeering statutes, that purpose, in the context of alleged obscenity violations, cannot be specifically construed to represent an attempt to restrain the sale or distribution of expressive materials. The legislative attack on racketeering activity is not, as appellants contend, merely a semantic device intended to circumvent well-established First Amendment doctrine.

Obscenity does not come within the area of constitutionally protected speech or press. *Miller v. California* (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.E.' 2d 419; *Roth v. United States* (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. Our legislature, as has Congress, has determined that obscenity violations should be one of the underlying offenses which may constitute racketeering activity as defined in the RICO statute. We must take heed of that legislative intent.

We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications. Thus we cannot agree with either appellants or the Court of Appeals that the purpose of the Indiana RICO/CRRA scheme, as it pertains to the predicate offense of obscenity, is to restrain the sale or distribution of expressive materials. It is irrelevant whether assets acquired through racketeering activity are obscene or not. They are subject to forfeiture if the elements of a pattern of racketeering activity are shown. The other CRRA remedies, such as license revocation, are also available regardless of the nature of the racketeering enterprise.

There is a dearth of caselaw concerning RICO-based forfeiture of expressive materials. Appellees rely primarily on *Western Business Systems, Inc. v. Slaton* (N.D.Ga. 1980), 492 F.Supp. 513, a case in which the plaintiffs sought a preliminary injunction in an attempt to prohibit prospectively RICO prosecutions based on the predicate crime of obscenity. The plaintiffs asserted that "the statute constitutes a prior restraint on First Amendment freedoms by allowing certain presumptively protected materials to be forfeited to the state." *Id.* at 514.

The court denied the motion for a preliminary injunction. After reserving ruling on the defendants' contention that the plaintiffs were not proper parties to bring the suit, *Id.*, the court found that the plaintiffs had not shown any significant infringement of First Amendment rights, were not in substantial need of protection, had shown no threat of irreparable harm from enforcement of the statute and had "shown little likelihood of eventual success on the merits of their constitutional attack on the Georgia RICO Act." *Id.* at 515.

In its opinion the court focused primarily on the plaintiffs' argument that the statute allows for the forfeiture of printed matter on the basis that it is probably obscene. According to the court, their "attempted reading does great violence to the words of the statute." *Id.* at 514.

> "As the court reads the statute, Ga. Code § 26-3403 prohibits the acquisition even of legitimate businesses with the proceeds of racketeering (as defined). Under § 26-3405 all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds, is subject to forfeiture to the state. These chattels might be anything from gardening equipment to cook books, and might also be sexually explicit materials. Forfeiture could apply to any chattel whatever, if it was acquired with the proceeds of racketeering. Thus, if the items seized are books or movie films, the seizure is totally unrelated to their contents. They would be forfeited under the statute not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime.

> "Similarly the law enforcement officer authorized by § 26-3405(d)(2) to seize materials prior to the filing of a complaint, would be seizing them upon probable cause to believe that they were subject to forfeiture and not — as plaintiffs argue — upon his personal judgment that the objects are obscene. We must keep in mind that these objects may be anything. *Id.*

We agree with court's reasoning that the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering laws is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene.

Underlying the Court of Appeals' opinion was its fear that "these civil remedies invite indiscriminate prosecution." *4447 Corp., supra* at 592. Believing the "draconian" RICO/CRRA statutes to be "prone to abuse given the relative ease with which the state may invoke their sanctions," *Id.*, the court posited that "[t]he potency of the prosecutorial weapon and the threat it poses to the legitimate exercise of First Amendment freedoms obviously exceed the bounds of constitutionally permissible regulation." *Id.* at 601-02.

We do not share the Court of Appeals' fears that prosecutors will abuse the CRRA remedies and that allowing the seizure and/or forfeiture of assets such as those at issue here will lead to the breakdown of the protections the First Amendment undeniably affords to various forms of expression. It cannot be presumed that prosecutorial discretion will be abused to the extent of threatening "the continued existence of bookstores and theaters." *See Id.* at 601. The remedies provided in the CRRA are a legitimate tool in the attack on racketeering activity. To find otherwise would thwart the legislative intent apparent in the inclusion of obscenity as a predicate offense for

a showing of a pattern of racketeering activity and would allow those engaged in racketeering activity to effectively shield their proceeds so gained behind a psuedo-constitutional barrier.

In sum, these actions seeking various CRRA remedies were instituted in an attempt to compel the forfeiture of the proceeds of alleged racketeering activity and not to restrain the future distribution of expressive materials. We hold that the RICO/CRRA statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments of the United States Constitution.

[2] We now address the issues certified by the respective trial courts for interlocutory appeal. In the Marion County case, the issue is whether a seizure order could be based on alleged obscenity violations not yet litigated.

There are no reported Indiana cases directly confronting the question of whether prior convictions for the predicate offenses are necessary to sustain a conviction for Corrupt Business Influence under Ind. Code § 35-45-6-2. In *Alvers*, *supra* at 85, the Court of Appeals stated in its recitation of the facts that the defendant "was charged with seven specific acts of two basic types — receiving stolen property and substituted cubic zirconias for diamonds in jewelry that was submitted for repairs, thereby evidencing a pattern of racketeering activity." While it can be implied that there were no convictions for the acts underlying the allegation of racketeering activity, the issue of whether those acts could provide in part the basis for the conviction was not raised on appeal.

Under the federal RICO statute, convictions for the predicate offenses are not required. *Sedima, S.P.R.L. v. Imrex Co.* (1985), 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346; *United States v. Malatesta* (5th Cir. 1978), 583 F.2d 748 *cert. denied* (1979), 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59. Nowhere in Ind. Code § 35-45-6-1, which defines "racketeering activity" and "pattern of racketeering activity," is there reference to the word conviction. *See Sedima*, *supra*. The statute speaks only of committing a "violation" of any of the enumerated predicate offenses.

Had the legislature intended to require convictions for the predicate offenses, it would have so worded the statute. Consequently, we hold that prior convictions for the underlying offenses are not required to prove a pattern of racketeering activity under Ind. Code. § 35-45-6-2.

Appellants make light of the construction of the Indiana RICO statute advanced by the office of the Indiana Attorney General in *J.N.S., Inc. v. State of Indiana* (7th Cir. 1983), 712 F.2d 303, in which the court affirmed the dismissal on standing grounds of the plaintiffs' complaint seeking a declaratory judgment regarding the constitutionality of the Indiana RICO statute as applied to obscenity. As stated by the court, "[w]hile our research discloses no Indiana cases construing the requirement of two 'violations,' at oral argument, a deputy attorney general opined that J.N.S. would have to accumulate two obscenity *convictions* before the state RICO statutes would apply." *Id.* at 306 (original emphasis). That opinion is not binding on this Court, and in any event there is no basis from which to conclude it is a proper construction of the Indiana RICO statute.

The Marion Circuit Court entered its *ex parte* seizure order upon a showing of probable cause to believe a violation of the RICO statute involving the property in question had occurred. As we construe the RICO statute, a showing of prior convictions for the alleged obscenity violations was not required. In order to prevail in the forfeiture action, appellee Goldsmith will of course have to show the existence of the obscenity violations in order to prove a violation of Ind. Code § 35-45-6-2 has occurred. It is at trial on the forfeiture and other requested CRRA remedies that the question of whether the materials are obscene will be litigated. A final determination of that question was not necessary at the hearing on the petition for seizure.

[3] The trial court in the Ft. Wayne case certified two questions: 1) whether the application for seizure violates due process; and 2) whether the order constitutes a violation of the First Amendment. As to the latter question, we have above held that the RICO/CRRA statutory scheme as applied to the

predicate offense of obscenity does not violate the First and Fourteenth Amendments. We accordingly find the seizure order does not constitute a prior restraint or in any other manner impinge upon appellants' rights under those amendments.

Concerning the former question, which was not addressed by the Court of Appeals in the majority opinion, we interpret the trial court's inquiry to be whether, in light of procedural due process guarantees, the appellants can be deprived of their property, without an adversary hearing, pending trial on the forfeiture action. Ind. Code § 34-4-30.5-3(b) clearly allows, upon the filing of a forfeiture action under Ind. Code § 34-4-30.5-3(a), for the entry of an order seizing property allegedly subject to forfeiture upon a showing of probable cause to believe a violation of the RICO statute involving the property in question has occurred.

The Marion Circuit Court, although not required to do so by Ind. Code § 34-4-30.5-3, *sua sponte* set trial for 72 hours after the entry of its seizure order. The Allen Circuit Court did not set a trial date after entering the *ex parte* seizure order; nevertheless, we find that the setting of a trial date within such a brief period is not required to guarantee the due process rights of appellants.

At the point a seizure order is entered there has been a judicial determination that there is probable cause to believe a violation of Ind. Code § 35-45-6-2 involving the property has occurred. The reason for an adversary hearing on the seizure of the property would be to determine whether the property had been unlawfully seized. Generally, a defendant would initiate such action by the filing of a motion to vacate the seizure order, as was done in the instant cases, and we would expect the court to hold a prompt adversarial hearing on such a motion. If no motion to vacate is filed, or if the motion is denied, there will be a full adversarial hearing on the merits of the forfeiture action. Although Ind. Code § 34-4-30.5-3(a) does not specifically provide a time frame for that hearing, we would interpret the statute to require the hearing on the question of forfeiture to be held within a reasonable time.

Thus a defendant whose property has been seized pursuant to Ind. Code § 34-4-30.5-3(b) is afforded due process by a prompt adversarial hearing on a motion to vacate the seizure order and/or by a hearing on the question of forfeiture held within a reasonable time after the CRRA complaint and petition for seizure have been filed. In the instant case, appellants were afforded a hearing on their motions to dismiss the complaints and to vacate the seizure orders. Because the proceedings were halted by the filing of the interlocutory appeals, there has been no opportunity for trials on the merits of the CRRA complaints. At this stage we can discern no violation of appellants' due process rights.

Transfer is granted and the opinion of the Court of Appeals is vacated. The causes are remanded for further proceedings not inconsistent with this opinion.

Supreme Court, U.S.
FILED
FEB 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-614

IN THE

# Supreme Court of the United States

October Term, 1987

RONALD W. SAPPENFIELD, et al.,
*Petitioners*

vs.

STATE OF INDIANA,
*Respondent.*

## RESPONSE OF THE STATE OF INDIANA SUBMITTED AT THE REQUEST OF THE SUPREME COURT OF THE UNITED STATES

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NO. 87-614

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vs.

STATE OF INDIANA,

*Respondent.*

## RESPONSE OF THE STATE OF INDIANA SUBMITTED AT THE REQUEST OF THE SUPREME COURT OF THE UNITED STATES

## SUMMARY OF RESPONDENT'S POSITION

The federal government as well as Indiana and other state governments have enacted statutes (generally called RICO laws) which provide for the seizure and forfeiture of property used or obtained by criminals in a pattern of criminal activity. One of the criminal activities which may support seizure or forfeiture in some jurisdictions is the distribution of obscene material.

The distribution of obscene material is a lucrative crime. People who engage in this lucrative criminal activity are concerned that a vigorous application of RICO laws to their criminal activity will reduce profits. For that reason, there are a number of active lawsuits challenging the constitutionality of RICO legislation.

A case involving Arizona's RICO legislation, *Arizona v. Steven Feld, Larry Chabler*, No. 87-1246, is pending before this court on Arizona's petition for certiorari.

The attorney general of Indiana is currently defending the Indiana RICO statute in three cases in the United States District Court for the Southern District of the State of Indiana. It appears to be in the best interests of judicial economy as well as the best interests of the citizens in Indiana to have the Supreme Court of the United States issue a dispositive ruling on the issue of the constitutionality of RICO legislation. Such a ruling, if made after full argument on the merits by the parties, may be of great assistance to state and federal courts which are, or will be, wrestling with the issue.

For the foregoing reasons, the Respondent waived the filing of a brief in opposition to the petition for writ of certiorari under Rule 22.4. Subsequently, counsel for the Respondent was "directed" by the Clerk of the Supreme Court to file a "response" to the petition for certiorari.

Respondent believes that the issues raised by the Petitioners should be addressed and resolved by the Supreme Court of the United States after full argument on the merits.

## STATEMENT OF THE CASE

The prosecuting attorney for Howard County, Indiana, filed charges in a state court under Indiana's criminal RICO statute (Indiana Code § 35-45-6-1 *et seq.*). The charging document alleged that Ronald W. Sappenfield and others had participated in a pattern of criminal activity arising out of the distribution of obscene material.

The Petitioners filed a motion to dismiss the RICO counts. The Petitioners argued that the Indiana RICO statute violated the First, Fifth, Sixth and Fourteenth Amendments to the constitution. The trial court granted the motion to dismiss. The Indiana Court of Appeals, relying on *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. Sup. Ct. 1987), reversed the trial court and reinstated the charges. The case relied upon by the

Indiana Court of Appeals is before this Court on a petition for certiorari *sub nom Fort Wayne Books, Inc. v. State of Indiana, et al.*, No. 87-470. The State of Indiana has filed a response in *Fort Wayne Books, Inc.* asking this court to grant certiorari and, after briefing and argument, decide the case on the merits.

## SUMMARY STATEMENT OF THE ARGUMENTS IN SUPPORT OF THE RULING OF THE SUPREME COURT OF INDIANA

The Respondent desires to have the relevant issues fully briefed on the merits. In a brief on the merits, Respondent intends to present the following arguments which will be supported by references to relevant case law.

1. It is within the constitutional power of the State of Indiana to establish criminal penalties for the distribution of obscene matter.

2. The State of Indiana may constitutionally seize property used by an individual or organization in a pattern of criminal activity.

3. The State of Indiana may constitutionally seize property which is obtained as a result of a pattern of criminal activity.

4. The State of Indiana may constitutionally seize the property of an organization which is engaged in a pattern of criminal activity.

5. The Indiana RICO statute, which provides for a prompt adversarial hearing and places the burden of proof on the prosecuting attorney, does not deprive defendants of their due process rights.

6. The Court of Appeals of Indiana properly found that the terms of the Indiana RICO statute are not unconstitutional.

7. RICO statues are a legitimate and constitutional exercise of the police powers of state and federal governments.

8. The provisions of the Indiana RICO statute are not unconstitutionally vague.

This Court has not directly addressed the question of whether a bookstore can be closed or padlocked as a condition of a criminal conviction or as part of a racketeering or organized crime forfeiture or conviction order. Although it is often argued that a formal or constructive closure is impermissible where the business deals in pornographic and obscene materials, *See: Arcara v. Cloud Books, Inc.*, 478 U.S. ____, 92 L.Ed.2d 568, at 574 (1986), this issue is not settled.

Abating obscenity by closure orders as a public nuisance has been approved in certain circumstances in Ohio and Idaho. In Ohio, closure with release provisions for innocent landlords was approved. *State of Ohio, ex rel. Ewing v. Film Entitled "Without a Stich"*, 37 Ohio St.2d 92, 307 N.E.2d 911 (1974), appeal dismissed for want of a substantial federal question *sub nom Art Theatre Guild, Inc. v. Ewing*, 421 U.S. 923 (1975). In Idaho, the state Supreme Court held that a hard-core pornographic bookstore could be closed as a nuisance for one year after final trial establishing the obscenity of the materials as a penalty for past misconduct without being an unlawful prior restraint. *State of Idaho, ex rel. Kidwell v. U.S. Marketing, Inc.*, 631 P.2d 622 (1981). The store owners filed a "civil rights" and declaratory action in federal court. The District Court dismissed that suit on abstention grounds and on the court's "opinion...that the Idaho Moral Nuisance Abatement Act is not flagrantly and patently violative of express constitutional prohibitions in every clause". *U.S. Marketing, Inc. v. Leroy*, 524 F.Supp. 1277, at 1280 (D. Idaho, 1981). The store then filed a direct appeal in this Court, which noted jurisdiction on the issue of closure as a remedy in obscenity nuisance orders, 454 U.S. 1140 (Jan. 11, 1982). After an arson fire destroyed the bookstore, the defendant-appellant filed for unilateral dismissal of its appeal under Rule 53. Over the express objection of the State of Idaho, plaintiffs-appellees, the Clerk entered a dismissal of the appeal on March 10, 1982, 455 U.S. 1009. This was not a dismissal "by stipulation of parties" as indicated in *Avenue Book Store v. City of Tallmadge, Ohio*, 459 U.S. 997, 74 L.Ed.2d 393, at 394 (1982) (Justice White dissenting from denial of writ of certiorari).

In the Tallmadge case, the store was enjoined from disseminating any obscene material in the future, rather than closed, but the question of First Amendment impact on obscenity offenses and distribution of hard-core pornography was presented for review by this Court in a way which differs from the concern expressed in *Vance v. Universal Amusement Co.*, 445 U.S. 308, at 317 (1980) (See also, *Vance*, 445 U.S., at 320-25, Justices White and Rehnquist dissenting).

This Court's affirmance in *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1982), did not relate to the closure or obscenity injunction issues since the Court of Appeals expressed "no opinion with respect to what circumstances, if any, would justify a closure subsequent to a determination that conforms in all respects to the First Amendment", in *Spokane Arcades, Inc. v Brockett*, 631 F.2d 135, at 139 (9th Cir. 1980). The questions were put to this Court, but not resolved here, in *Sequoia Books, Inc. v. Illinois*, ____ U.S. ____, 56 L.W. 3283, 3285 (Oct. 19, 1987), denial of writ of certiorari to the opinion below, at 500 N.E.2d 82 (Ill. App. 1986).

The time is right for a ruling that courts can employ forfeiture and injunction remedies against a business which is proven to be violating obscenity and racketeering laws. State courts, such as those in Ohio, Idaho, Illinois, and Indiana appear ready and willing to fashion careful but strong remedies against illegal traffic in obscenity, and this Court should give them its express approval.

## CONCLUSION

Pursuant to Rule 22.4, Respondent expressly waives the filing of a brief in opposition to the petition for certiorari. Respondent suggests that judicial economy may best be served by granting certiorari, joining this case with No. 87-470, and allowing the parties to brief and argue the issues on their merits. Respondent expressly reserves argument on the merits until certiorari is granted.

Respectfully submitted,

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*Attorneys for Respondent*

(8) (3)

**NOS. 87-470 AND 87-614**

Supreme Court, U.S.
FILED
MAY 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1987

—o—

No. 87-470

FORT WAYNE BOOKS, INC.,

*Petitioner,*

vs.

STATE OF INDIANA, *et al.*,

*Respondents.*

No. 87-614

RONALD W. SAPPENFIELD, *et al.*,

*Petitioners,*

vs.

STATE OF INDIANA,

*Respondent.*

—o—

## ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA AND THE INDIANA COURT OF APPEALS

—o—

## JOINT APPENDIX

—o—

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**Petition for Certiorari in No. 87-470 Filed Sept.16, 1987**
**Certiorari in No. 87-470 Granted March 7, 1988**
**Petition for Certiorari in No. 87-614 Filed Oct. 14, 1987**
**Certiorari in No. 87-614 Granted March 7, 1988**

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STATE OF INDIANA, et al. v. FORT WAYNE BOOKS, et al.

RELEVANT DOCKET ENTRIES

| Date of Filing | ALLEN CIRCUIT COURT |
|---|---|
| 3/19/84 | Comes now Plaintiff, by counsel and files Complaint for Injunctive Relief From Corrupt Business Influence And Action For Forfeiture Of Property Incident To Corrupt Business Influence And Verified Petition For Seizure Of Property Subject To Forfeiture And Probable Cause Affidavit. |
| 3/19/84 | State of Indiana and its Prosecuting Attorney for the 38th judicial circuit submit evidence. Probable cause found. Order issued for seizure and forfeiture. |
| 3/23/84 | Come now defendants, Fort Wayne Books, Cinema Blue & Erotica House Bookstore and file a Motion To Vacate And/Or Modify Order which is now set for hearing on March 29, 1984. |
| 3/27/84 | Come now defendants, by counsel, and file Motion For Protective Order. The Court hereby approves the same. |
| 3/27/84 | Comes now defendant, by counsel, and files Supplemental Motion to Dismiss Order of Court entered March 19, 1984 and Memorandum of Law Re: Court Order. |
| 3/29/84 | Plaintiffs file Response To Defendants' Motion To Vacate Or To Modify Court Order Entered And Filed On March 19, 1984 and Defendants' Supplemental Motions To Dismiss. |
| | Defendants' motions to vacate or modify and to dismiss are denied. Defendants file Motion to Stay Pending Appeal. Denied without preju- |

dice to reapply if proper application for Interlocutory Appeal is made and perfected.

4/3/84 Defendants, Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc., by counsel, file praecipe for transcript of entire record, emergency motion for inventory of property removed and/or return of property, petition to certify issues and grounds to the Indiana Court of Appeals upon interlocutory order of March 19, 1984, . . . and motion for stay pending appeal.

4/4/84 Plaintiff files Answers To Emergency Motion For Inventory Of Property Removed And/Or Return Of Property. Motion For Inventory is moot as having been provided and [motion] for return of property is in all respects denied.

4/12/84 Defendants, Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc., by counsel file: Assignment of Error; Supplemental and Consolidated Petition to Certify Issues and Grounds to the Indiana Court of Appeals Upon Interlocutory Order of March 19, 1984 under Indiana Rules of Appellate Procedure Rule 4(B)(6); and Motion for Stay [Pending] Appeal.

4/17/84 Plaintiff, by counsel files: Response to "Supplemental and Consolidated Petition to Certify Issues and Grounds to the Indiana Court of Appeals . . ."; Response to Defendants' Motions for Stay Pending Appeal; and Lis Pendens Notice.

4/18/84 Court DENIES in their entirety Defendants', Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc.; (1) Motion for Stay Pending Appeal filed 4/3/84; (2) the Assignment of Error and (3) Motion for Stay Pending Appeal filed 4/12/84;

grants . . . the Petition to Certify filed 4/3/84 and the Supplemental Petition to Certify filed 4/12/84 . . . . The Court files its written order of certification pursuant to request and App. Rule 4(B)(6). The Court further finds that the parties have proceeded diligently in respect to prosecution of this cause for consideration as an appealable interlocutory order. Praecipe for Transcript of Entire Record is filed.

6/26/84 Notice received from Court of Appeals. Extension of time to file record of proceedings, granted to and including June 30, 1984.

4/8/85 Copy of Order from Indiana Court of Appeals [staying seizure of defendants' property] received and noted. Order of this Court dated March 19, 1984 modified to conform thereto.

5/12/85 Unofficial Opinion received and filed this date from the Court of Appeals of Indiana.

INDIANA COURT OF APPEALS

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12/15/83 Motion for Stay (Modification) of Interlocutory Injunction without Bond Pending Appeal [in *4447 Corporation v. Goldsmith*]

1/3/84 Brief of Appellants [*4447 Corporation v. Goldsmith*]

1/18/84 Brief of Appellee [*4447 Corporation v. Goldsmith*]

2/2/84 It is therefore Ordered, Adjudged and Decreed by the Court that the Order heretofore entered by the Circuit Court of Marion County, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788, dated August 1, 1983, is hereby modified pending appeal in the following respects:

A. That the Indianapolis Police Department shall forthwith unlock, unseal and release all

property within the commercial building at 4266 (erroneously designated 4276) West 38th St., Marion County, Indiana, which property had heretofore been locked, sealed and secured pursuant to the Order of the Marion County Circuit Court, filed August 1, 1983; and

B. Defendants shall preserve all property at 4266 West 38th Street, Marion County Indiana until further order of this Court; defendants shall not transfer or remove from said Building any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of this Court. This paragraph shall not prevent defendants at 4266 West 38th Street, Marion County, Indiana, from transferring or selling books, magazines, newspapers or videotapes. However, until further order of this Court, all other property shall be held by the defendants.

4/18/84 Verified Petition to Certify Issues and Grounds to the Indiana Court of Appeals upon Interlocutory Order of March 19, 1984 [*Fort Wayne Books v. Sims*]

4/27/84 Motion for Stay (Modification) of Interlocutory Injunction without Bond Pending Appeal [in *Fort Wayne Books v. Sims*]

5/2/84 ORDER OF CONSOLIDATION: IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Cause No. 3-484A106 as hereinabove captioned be and the same hereby is consolidated with Cause No. 4-1283A415 as hereinabove captioned for a determination of the common question of law therein presented. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said causes of action

hereinabove consolidated be and the same hereby are consolidated under Cause No. 4-1283A415.

[6/84] [Brief of Appellants, Fort Wayne Books, Inc., et al.]

7/23/84 Brief of Appellees State of Indiana and Stephen Sims

9/25/84 Request for Expeditious Ruling on Motion for Stay (Modification) [in *Fort Wayne Books v. Sims*]

10/10/84 State's Response to Request for Expeditious Ruling on Motion for Stay

4/ 4/85 *ORDER*: IT IS THEREFORE ORDERED that the Order heretofore entered by the Allen Circuit Court, the Honorable Thomas L. Ryan, Judge, presiding, in Cause Number CC84-446 of said Court, dated March 19, 1984, is hereby modified, and ordered to conform with the stay heretofore made and entered in the *4447 Corporation* case, pending the further order of this Court. A written opinion on the merits of the appeal will imminently follow this order.

6/12/85 [Opinion of Court of Appeals]

INDIANA SUPREME COURT

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5/ 2/84 Appellees' Verified Petition for Transfer of [Consolidated] Case to the Supreme Court of Indiana

7/17/84 ORDER: This Court being duly advised in the premises now DENIES the "Appellees' Verified Petition(s) for Transfer of Case(s) to the Supreme Court of Indiana. The consolidated cases are remanded to the Indiana Court of Appeals for consideration and decision. Additionally, appellants' "Motion for Stay (Modification) of Interlocutory Injunction Without Bond Pending Appeal" under cause no. 3-484 A 106 is also

remanded to the Court of Appeals for disposition.

8/ 8/85 Appellees' Petition to Transfer [following decision of Court of Appeals]

8/23/85 Appellants' Memorandum in Opposition to Appellee's Petition to Transfer

3/26/86 [Appellants'] Supplemental Citations to Authorities Mentioned in Argument

7/16/86 State's Submission of Supplemental Authority

9/ 9/86 Response to Appellees' Submission of Supplemental Authority; Appellants' Memorandum Re Significance of *Arcara v. Cloud Books, Inc.*

1/20/87 Appellees' Additional Authority

3/ 2/87 Appellee's "Petition to Transfer" is hereby GRANTED, with opinion.

3/21/87 Appellants' Petition for Rehearing

6/18/87 "Appellants' Petition for Rehearing" is hereby denied.

8/19/87 Petition [of Burke H. Mendenhall] for Stay of Execution in Connection with Petition for Certiorari

9/ 2/87 ORDER: This Court now denies the "Petition for Stay of Execution in Connection with Petition for Certiorari," as this Court is without jurisdiction over this matter.

3/ 7/88 United States Supreme Court Issued the Enclosed Order: The Petition herein for a Writ of Certiorari to the Supreme Court of the State of Indiana is Granted.

IN THE ALLEN CIRCUIT COURT
CAUSE NO. CC-84-446

STATE OF INDIANA )
) ss
COUNTY OF ALLEN )

STATE OF INDIANA AND )
STEPHEN M. SIMS, PROSECUTING )
ATTORNEY FOR THIRTY-EIGHTH )
JUDICIAL CIRCUIT, )
Plaintiff, )
vs. )
)
FORT WAYNE BOOKS, INC., )
CINEMA BLUE OF FORT WAYNE, )
INC., EROTICA HOUSE )
BOOKSTORE, INC., MR. DONALD )
KRONTZ; MR. DONALD KRONTZ )
IN HIS CAPACITY AS MANAGER )
OF FORT WAYNE BOOKS, INC., )
MANAGER OF CINEMA BLUE OF )
FORT WAYNE, INC., MANAGER )
OF EROTICA HOUSE BOOK- )
STORE, INC.; MR. DONALD )
KRONTZ IN HIS CAPACITY AS A )
MEMBER OF THE BOARD OF )
THE BOARD OF DIRECTORS OF )
FORT WAYNE BOOKS, INC., )
CINEMA BLUE OF FORT WAYNE, )
INC., EROTICA HOUSE BOOK- )
STORE, INC.; MARK A BROOKS, )
THE GROUP d/b/a/ EUROPEAN )
INVESTMENTS N V, THE GROUP )
d/b/a THEATRE A CORPORATION, )
NANCY S. JOHNSON, )
CYRUS B. COOPER, )
Defendants. )

## COMPLAINT FOR INJUNCTIVE RELIEF FROM CORRUPT BUSINESS INFLUENCE AND ACTION FOR FORFEITURE OF PROPERTY INCIDENT TO CORRUPT BUSINESS INFLUENCE

Comes now Stephen M. Sims as Prosecuting Attorney for the Thirty-Eighth Judicial Circuit of the State of Indiana and brings this civil action for injunctive relief and forfeiture of property incident to corrupt business influence, pursuant to Indiana Code 34-4-30.5-2, 34-4-30.5-3, and alleges that said action is brought to enjoin a violation of Indiana Code 35-45-6-2 and violations of Indiana Code 35-30-10.1-2 and violations of Indiana Code 35-49-3-1 and in his capacity as Prosecuting Attorney of said Thirty-Eighth Judicial Circuit alleges as follows:

I.

That the defendant Fort Wayne Books, Inc. has since the 8th day of June, 1981, up to and including the date of the filing of this complaint:

a) offered to distribute, distributed, or exhibited to another person obscene matter; and

b) that said Fort Wayne Books, Inc. has during said period of time attempted to commit, or conspired to commit, or aided and abetted in a violation of Indiana Code 35-30-10-2 and Indiana Code 35-49-3-1 and Indiana Code 35-45-6-2; and

c) that Fort Wayne Books, Inc. has "associated in fact" with Cinema Blue of Fort Wayne, Inc., Erotica House Bookstores, Inc., Donald Krontz personally and as a manager and member of the board of directors of the aforesaid corporations, the other defendants named herein and individuals not known to your plaintiff, in at least two incidents of racketeering activity that have had the same or similar intent, result, ac-

complice, victim, or method of commission and that as a result of such actions the defendant Fort Wayne Books, Inc. has received proceeds directly or indirectly derived from a pattern of racketeering activity; and

d) that said corporation has used or invested those proceeds to acquire an interest in real property or to establish or to operate the enterprise; and

e) that through said pattern of activity said corporation has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of real property or an enterprise; and

f) that said corporation has employed Donald Krontz and others not known to your plaintiff who have been employed and associated with the enterprise and who knowingly or intentionally, on a daily basis, conducted or otherwise participated in the activities of that enterprise through a pattern of "racketeering activity".

In support thereof your plaintiff further alleges as follows:

1. That Fort Wayne Books, Inc. is an Indiana Corporation which began its corporate existence on the 4th day of April, 1979, and which has continued in existence up to and including the date of the filing of this complaint.

2. That the Certificate of Incorporation of Fort Wayne Books, Inc. under Article IV establishes the name and address of the corporate resident agent for service of process as C T Corporation System and listed its address as 1011 Merchants Bank Building, Indianapolis, Indiana 46204, and that said Articles of Incorporation indicate that the principal office of said corporation and the post office address of the corporation is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

3. That said Fort Wayne Books, Inc. has from 1981 up to and including the date of the filing of this complaint operated its principal activities and acts at 227 West Pearl Street, Fort Wayne, Allen County, Indiana.

4. That on July 1, 1983 and, to the best of your petitioner's knowledge, up to the date of the filing of this complaint Donald Krontz was employed by Fort Wayne Books, Inc. as the manager of said corporation and was simultaneously employed by Cinema Blue of Fort Wayne, Inc. as the manager of that corporation and was employed by Erotica House Bookstore, Inc. as the manager of that corporation. That simultaneously Mr. Donald Krontz is and has been a member of the board of directors of all three of said corporations.

5. That on or about the 8th day of June, 1981, Fort Wayne Books, Inc. was also known as Main Street Swinger World Adult News and Peep Show and that it operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 8th day of June, 1981 violate Indiana Code 35-30-10.1-2 in that its human agent, Allen H. Sedelbauer, did sell obscene materials to Officer Charles Dennis of the Fort Wayne Police Department and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-81-10113 of two counts of violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

6. That on June 15, 1981 Allen H. Sedelbauer did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to Charles Dennis, a Fort Wayne police officer. That said Allen H. Sedelbauer was convicted by the Allen Superior Court in Cause No. CRM-81-10114 of said violation. That at the time of said offense said Allen H. Sedelbauer was an agent of the cor-

poration acting within his actual authority in the normal course of business at 227 Pearl Street, Fort Wayne, Indiana, for and on behalf of Fort Wayne Books, Inc.

7. That on the 11th day of February, 1982 Allen H. Sedelbauer did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 by selling said obscene matter to a Fort Wayne police officer. That Allen H. Sedelbauer was convicted by the Allen Superior Court in Cause No. CRM-82-2771 of said violation. That at the time of said offense Allen H. Sedelbauer was an agent of the corporation acting within his actual authority in the normal course of business at 227 Pearl Street, Fort Wayne, Indiana, for and on behalf of Fort Wayne Books, Inc.

8. That on or about the 10th day of June 1982 Fort Wayne Books, Inc. operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 10th day of June, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, James D. Harp, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-14255 of said violation.

9. That on or about the 9th day of August, 1982 Fort Wayne Books, Inc. operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 9th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Barry W. Dangler, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-14253 of said violation.

10. That on or about the 28th day of September, 1982 Fort Wayne Books, Inc. operated a store in Allen County,

Indiana, at 227 Pearl Street, and that said corporation did on the 28th day of September, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Daniel L. Morgan, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-22385 of said violation.

11. That on or about the 29th day of September, 1982 Fort Wayne Books, Inc. operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 29th day of September, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Daniel L. Morgan, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-22386 of said violation.

12. That on or about the 1st day of December, 1982 Fort Wayne Books, Inc. operated a store in Allen County, Indiana, at 227 Pearl Street, and that said corporation did on the 1st day of December, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Anthony Leedy, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted by the Allen Superior Court in Cause No. CRM-82-22452 of said violation.

13. That on or about the 9th day of May 1983, Fort Wayne Books, Inc. did employ one Mark A. Brooks, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, that is 227 Pearl Street, Fort Wayne,

Allen County, Indiana, did on the 9th day of May, 1983, at the County of Allen in the State of Indiana, then and there unlawfully and knowingly distribute obscene material for consideration in violation of Indiana Code 35-30-10.1-2 by selling a certain obscene publication, to-wit: a magazine entitled "Punk Dominatrix". That said defendant was convicted in the Allen Superior Court for "Distributing Obscene Matter for Consideration" in Count I of Cause No. CR-83-386.

14. That on or about the 13th day of May, 1983, Fort Wayne Books, Inc. did employ one Mark A. Brooks, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, that is 227 Pearl Street, Fort Wayne, Allen County, Indiana, did on the 13th day of May, 1983, at the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Kinky Mistress". That said defendant was convicted in the Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count II of Cause No. CR-83-386.

15. That on or about the 3rd day of June, 1983, Fort Wayne Books, Inc. did employ one Mark A. Brooks, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual

authority and in the normal course of business at said corporation's business address, that is 227 Pearl Street, Fort Wayne, Allen County, Indiana, did on the 3rd day of June 1983, at the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Breast Bondage". That said defendant was convicted in the Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count III of Cause No. CR-83-386.

16. That on or about the 9th day of May, 1983, Fort Wayne Books, Inc. did employ one Daniel L. Morgan, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, on the 9th day of May, 1983, at the County of Allen and in the State of Indiana, said Daniel L. Morgan did then and there violate Indiana Code 35-30-10.1-2 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Fantasy World". That said defendant was convicted in the Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count I of Cause No. CR-83-384.

17. That on or about the 10th day of May, 1983, Fort Wayne Books, Inc. did employ one Daniel L. Morgan, who

was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, on or about the 10th day of May, 1983, at the County of Allen and in the State of Indiana, said Daniel L. Morgan did then and there violate Indiana Code 35-30-10.1-2 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Kinky Mistress". That said defendant was convicted in the Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count II of Cause No. CR-83-384.

18. That on or about the 7th day of June, 1983, Fort Wayne Books, Inc. did employ one Daniel L. Morgan, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, on or about the 7th day of June, 1983, at the County of Allen, State of Indiana, said Daniel L. Morgan did then and there violate Indiana Code 35-30-10.1-2 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Hard". That said defendant was convicted in the

Allen Superior Court of "Distributing Obscene Matter for Consideration" in Count III of Cause No. CR-83-384.

19. That on or about the 29th day of November, 1983, and on the 1st day of December, 1983, Fort Wayne Books, Inc. did employ one Nancy S. Johnson who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within her actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, she did respectively, on or about the 29th day of November, 1983, and the 1st day of December, 1983, at the County of Allen, State of Indiana, then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter for consideration by selling (respectively) a certain obscene publication, to-wit: a magazine entitled "Rope Party" and a magazine entitled "Shackled". That said Nancy S. Johnson was convicted of two counts of "Distributing Obscene Matter for Consideration" in the Allen Superior Court in Cause No. CR-83-509.

20. That on or about the 21st day of November, 1983, and the 5th day of December, 1983, Fort Wayne Books, Inc. did employ one Mark A. Brooks who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen

County, Indiana, he did respectively on or about the 21st day of November, 1983, and the 5th day of December, 1983, at the County of Allen, State of Indiana, then and there violate Indiana Code 35-49-3-1 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling (respectively) a certain obscene publication, to-wit: a magazine entitled "Bondage" and a magazine entitled "Corporal". That said Mark A. Brooks was convicted of two counts of "Distributing Obscene Matter for Consideration" in Allen Superior Court Cause No. CR-83-513.

21. That Fort Wayne Books, Inc. and A Group d/b/a European Investments N V, in addition to the aforesaid acts, has on a daily basis from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 227 Pearl Street, Fort Wayne, Allen County, Indiana, as a place to offer to distribute, distribute, and exhibit to other persons obscene matter.

22. That Fort Wayne Books, Inc. and A Group d/b/a European Investments N V, in addition to the aforesaid acts, has on a daily basis from the 8th day of June, 1981 up to and including the date of the filing of this complaint:

a) used the real estate commonly known as 227 Pearl Street, Fort Wayne, Allen County, Indiana, as a place to gather for distribution, display, and offer to other persons for consideration similar obscene matter and have continued to commit, or attempt to commit, or conspire to commit, or to aid and abet in the violation of Indiana Code 35-45-6-2 and Indiana Code 35-30-10. 1-2 or 35-49-3-1;

b) that title to said real property commonly known as 227 Pearl Street, Fort Wayne, Indiana, is vested in

a Group d/b/a European Investments N V, P.O. Box 408, Durand, Michigan 48429, and that said European Investments N V constitutes part of an enterprise whose activity has resulted in the receipt of proceeds, directly or indirectly, derived from a pattern of racketeering activity and that said group has used the proceeds derived from such activities to acquire an interest in real property or to establish or to operate an enterprise; and that said group has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of the real estate commonly known as 227 Pearl Street, Fort Wayne, Allen County, Indiana, and all of the contents therein, or an enterprise; and that said group has consistently employed individuals and induced individuals to be associated with an enterprise and has knowingly or intentionally caused those individuals to participate in the activities of that enterprise.

23. That Fort Wayne Books, Inc. and A Group d/b/a European Investments N V, in addition to the aforesaid acts, has from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 227 Pearl Street, Fort Wayne, Allen County, Indiana, as a place to establish an "enterprise" in that it has associated in fact during said period with Cinema Blue of Fort Wayne, Inc. and Erotica House Bookstore, Inc. That on the 6th day of July, 1978, the application for admission of Cinema Blue of Fort Wayne, Inc., a foreign corporation, to do business in the State of Indiana was filed and approved, such application for admission showing that same is a Delaware corporation who listed its local address as 2441 Broadway, Fort Wayne, Indiana 46807, and which in Article XII designated its resident agent for the purposes of legal process as C T Corporation System, same being located at 1011 Merchants

Bank Building, Indianapolis, Indiana 46204. Further, its association in fact is demonstrated by the Certificate of Incorporation of Erotica House Bookstores, Inc., which was duly admitted on the 3rd day of March, 1980, and whose Articles of Incorporation show that the designated corporate agent for legal process for said corporation is C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204, and that its principal office is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

24. That on or about the 15th day of March, 1984, the enterprise doing business as Fort Wayne Books, Inc. did employ one Mark A. Brooks, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within his actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, said Mark A. Brooks did then and there violate Indiana Code 35-49-3-1 in that he unlawfully and knowingly exhibited to another person obscene matter on four occasions on said date. By way of example and not limitation, said Mark A. Brooks did sell "tokens" to Fort Wayne police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens and view four "motion or video pictures" on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter

or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole, lacked serious literary, artistic, political or scientific value.

25. That on or about the 16th day of March, 1984, the enterprise doing business as Fort Wayne Books, Inc. did employ personnel who were associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Fort Wayne Books, Inc. within their actual authority and in the normal course of business at said corporation's business address, 227 Pearl Street, Fort Wayne, Allen County, Indiana, said personnel did then and there violate Indiana Code 35-49-3-1 in that they unlawfully and knowingly exhibited to another person obscene matter on twelve occasions on said date. By way of example and not limitation, said personnel did sell "tokens" to Fort Wayne police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens and view twelve "motion or video pictures" on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole, lacked serious literary, artistic, political or scientific value.

II.

That the defendant Cinema Blue of Fort Wayne, Inc. has since the 8th day of June, 1981, up to and including the date of the filing of this complaint:

a) offered to distribute, distributed, or exhibited to another person obscene matter; and

b) that said Cinema Blue of Fort Wayne, Inc. has during said period of time attempted to commit, or conspired to commit, or aided and abetted in a violation of Indiana Code 35-30-10.1-2 and Indiana Code 35-49-3-1 and 35-45-6-2; and

c) that Cinema Blue of Fort Wayne, Inc. has "associated in fact" with Fort Wayne Books, Inc., Erotica House Bookstore, Inc., Donald Krontz personally and as a manager and member of the board of directors of the aforesaid corporations, the other defendants named herein and individuals not known to your plaintiff, in at least two incidents of racketeering activity that have had the same or similar intent, result, accomplice, victim, or method of commission and that as a result of such actions the defendant Cinema Blue of Fort Wayne, Inc. has received proceeds directly or indirectly from a pattern of racketeering activity; and

d) that said corporation has used or invested those proceeds to acquire an interest in real property or to establish or to operate the enterprise; and

e) that through said pattern of activity said corporation has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of real property or an enterprise; and

f) that said corporation has employed Donald Krontz and others not known to your plaintiff who have been employed and associated with the enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise through a pattern of "racketeering activity".

In support thereof your plaintiff further alleges as follows:

1. That Cinema Blue of Fort Wayne, Inc. is a Delaware corporation which received its "Certificate of Admission" to operate in the State of Indiana on the 6th day of July, 1978, and which has continued its operation in the State of Indiana up to and including the date of the filing of this complaint.

2. That the "Certificate of Admission" for said corporation establishes the name and address of the corporate resident agent for service of process as C T Corporation System and listed its address as 1011 Merchants Bank Building, Indianapolis, Indiana 46204. Further, that said "Certificate of Admission" cites the legal address of said corporation in the State of Indiana as 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

3. That said Cinema Blue of Fort Wayne, Inc. has from 1981 up to and including the date of the filing of this complaint operated its principal activities and acts at 2441 Broadway, in the City of Fort Wayne, County of Allen, State of Indiana.

4. That on July 1, 1983 and, to the best of your petitioner's knowledge, up to the date of the filing of this complaint Donald Krontz was employed by Cinema Blue of Fort Wayne, Inc. as the manager of said corporation and was simultaneously employed by Fort Wayne Books, Inc. as the manager of that corporation and was employed by Erotica House Bookstore, Inc. as the manager of that corporation. That simultaneously Mr. Donald Krontz is and has been a member of the board of directors of all three of said corporations.

5. That on the 4th day of February, 1982, Suzanne Krontz did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said Suzanne Krontz was convicted by the Allen Superior Court in Cause No. CRM-82-2769 of said violation. That at the time of said offense said Suzanne Krontz was an agent of the corporation acting within her actual authority in the normal course of business at 2441 Broadway in the City of Fort Wayne, County of Allen, State of Indiana, for and on behalf of Cinema Blue of Fort Wayne, Inc.

6. That on or about the 16th day of February, 1982 Cinema Blue of Fort Wayne, Inc. operated a store in Allen County, Indiana, at 2441 Broadway, Fort Wayne, Indiana, and that said corporation did on the 16th day of February, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Suzanne Krontz, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-2770, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

7. That on the 10th day of June, 1982 Lloyd C. Ashley did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said Lloyd C. Ashley was convicted by the Allen Superior Court in Cause No. CRM-82-14251 of said violation. That at the time of said offense said Lloyd C. Ashley was an agent of the corporation acting within his actual authority in the normal course of business at 2441 Broadway, Fort Wayne, Allen County,

Indiana, for and on behalf of Cinema Blue of Fort Wayne, Inc.

8. That on or about the 1st day of July, 1982 Cinema Blue of Fort Wayne, Inc. operated a store in Allen County, Indiana, at 2441 Broadway, Fort Wayne, Indiana, and that said corporation did on the 1st day of July, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lloyd C. Ashley, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16917, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

9. That on the 8th day of July, 1982, Ronald E. Richards, Jr. did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said Ronald E. Richard, Jr. was convicted by the Allen Superior Court in Cause No. CRM-82-14258 of said violation. That at the time of said offense said Ronald E. Richards, Jr. was an agent of the corporation acting within his actual authority in the normal course of business at 2441 Broadway in the City of Fort Wayne, County of Allen, State of Indiana, for and on behalf of Cinema Blue of Fort Wayne, Inc.

10. That on or about the 14th day of September, 1982, Cinema Blue of Fort Wayne, Inc. operated a store in Allen County, Indiana, at 2441 Broadway, Fort Wayne, Indiana, and that said corporation did on the 14th day of September 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Nancy L. Johnson a/k/a Nancy Schwass Johnson, did sell obsecene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Su-

perior Court of said offense in Cause No. CRM-82-16923, same being a violation of Indiana Code 35-30-10.1-2, Sales of Obscene Matter.

11. That on or about the 1st day of December, 1982, Cinema Blue of Fort Wayne, Inc. operated a store in Allen County, Indiana, at 2441 Broadway, Fort Wayne, Indiana, and that said corporation did on the 1st day of December, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Mary Kathleen Krontz, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-22451, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

12. That on or about the 21st day of November, 1983, Cinema Blue of Fort Wayne, Inc. did employ one Ronald E. Richards, Jr., who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Cinema Blue of Fort Wayne, Inc. within his actual authority and in the normal course of business at said corporation's business address, 2441 Broadway, Fort Wayne, Allen County, Indiana, on or about the 21st day of November, 1983, at the County of Allen, State of Indiana, said Ronald E. Richards, Jr. did then and there violate Indiana Code 35-49-3-1 in that he unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Bitch In Heat". That said Ronald E. Richards, Jr. was convicted in the Allen Superior Court of Count I of Cause No. CR-83-511. That Ronald E. Richards, Jr. was not only an employee

of Cinema Blue of Fort Wayne, Inc. but that he was also an employee of Erotica House Bookstore, Inc., 930 Broadway, in that on December 7, 1983, said Ronald E. Richards, Jr., who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for Cinema Blue of Fort Wayne, Inc. and Erotica House Bookstore, Inc. at Erotica House Bookstore, Inc. business address 930 Broadway, Fort Wayne, Allen County, Indiana, on or about the 7th day of December, 1983, at the County of Allen, State of Indiana, said Ronald E. Richards, Jr. did then and there violate Indiana Code 35-49-3-1 in that he unlawfully and knowingly distributed obscene matter for consideration to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Wet Fantasies". That said Ronald E. Richards, Jr. was convicted in Count II of Cause No. CR-83-511 in the Allen Superior Court.

13. That on or about the 22nd day of November, 1983 and the 30th day of November, 1933, Cinema Blue of Fort Wayne, Inc. did employ one Mary Kathleen Krontz, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Cinema Blue of Fort Wayne, Inc. within her actual authority and in the normal course of business at said corporation's business address, 2441 Broadway, Fort Wayne, Allen County, Indiana, on or about the 22nd and 30th days of November, 1983, respectively, at the County of Allen, State of Indiana, said Mary Kathleen Krontz did then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter

for consideration, to-wit: by selling respectively a certain obscene publication, to-wit: a magazine entitled "Leather Bound" and a magazine entitled "Nazi Lust". That Mary Kathleen Krontz was convicted in Allen Superior Court of said offenses in Counts I and II of Cause No. CR-83-512.

14. That Cinema Blue of Fort Wayne, Inc. and A Group d/b/a/ Theatre A Corporation, in addition to the aforesaid acts, has from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana, as a place to offer to distribute, distribute, and exhibit to other persons obscene matter of a similar nature as set forth in this complaint.

15. That Cinema Blue of Fort Wayne, Inc. and A Group d/b/a Theatre A Corporation, in addition to the aforestated acts, has from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana:

a) as a place to gather for distribution, display, and offer to other persons for consideration similar obscene matter and have continued to commit, or to attempt to commit, or to conspire to commit, or to aid and abet in violation of Indiana Code 35-45-6-2 and 35-30-10.1-2 and Indiana Code 35-49-3-1;

b) that the Group d/b/a Theatre A Corporation, 819 Southeast Second Street, Evansville, Indiana 47713, holds legal title to said real estate and that said group as a result of this continued activity has profited from the receipt of proceeds, directly or indirectly, derived from a pattern of racketeering activity and that said group has used the proceeds derived from such activities to acquire an interest in real property or to establish or to operate an enterprise;

c) that said group has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of the real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana, and all of the contents therein, or an enterprise; and

d) that said group has consistently employed individuals and induced individuals to be associated with an enterprise and has knowingly or intentionally caused those individuals to participate in the activities of that enterprise.

16. That Cinema Blue of Fort Wayne, Inc., in addition to the aforestated acts, has from the 8th day of June, 1981 up to and including the date of the filing of this complaint used the real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana, as a place to establish an "enterprise" in that it has associated in fact during said period with Fort Wayne Books, Inc. and Erotica House Bookstore, Inc. That Fort Wayne Books, Inc. is an Indiana corporation which began its corporate existence on the 4th day of April 1979, whose Articles of Incorporation show C T Corporation System as its agent for lawful process, same being located at 1011 Merchants Bank Building, Indianapolis, Indiana 46204. Further, it is associated in fact with Erotica House Bookstore, Inc. whose Certificate of Incorporation with the State of Indiana shows that same was duly admitted on the 3rd day of March, 1980, and whose Articles of Incorporation show that the designated corporate agent for legal process for said corporation is C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204, and that its principal office is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

17. That on or about the 15th day of March, 1984, the enterprise doing business as Cinema Blue of Fort Wayne, Inc. did employ personnel who were associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Cinema Blue of Fort Wayne, Inc. within their actual authority and in the normal course of business at said corporation's business address, 2441 Broadway, Fort Wayne, Allen County, Indiana, said personnel did then and there violate Indiana Code 35-49-3-1 in that they unlawfully and knowingly exhibited to another person obscene matter on six occasions on said date. By way of example and not limitation, said personnel did sell "tokens" to Fort Wayne police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens and view six "motion or video pictures" on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole, lacked serious literary, artistic, political or scientific value.

18. That on or about the 16th day of March, 1984, the enterprise doing business as Cinema Blue of Fort Wayne, Inc. did employ personnel who were associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of

that enterprise in that while acting as an agent for said Cinema Blue of Fort Wayne, Inc. within their actual authority and in the normal course of business at said corporation's business address, 2441 Broadway, Fort Wayne, Allen County, Indiana, said personnel did then and there violate Indiana Code 35-49-3-1 in that they unlawfully and knowingly exhibited to another person obscene matter on two occasions on said date. By way of example and not limitation, said personnel did sell "tokens" to Fort Wayne police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens and view two "motion or video pictures" on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole, lacked serious literary, artistic, political or scientific value.

III.

That the defendant Erotica House Bookstore, Inc. has since the 8th day of June, 1981, up to and including the date of the filing of this complaint:

a) offered to distribute, distributed, or exhibited to another person obscene matter; and

b) that said Erotica House Bookstore, Inc. has during said period of time attempted to commit or con-

spired to commit, or aided and abetted in a violation of Indiana Codes 35-30-10.1-2, 35-49-3-1, and 35-45-6-2; and

c) that Erotica House Bookstore, Inc. has "associated in fact" with Cinema Blue of Fort Wayne, Inc., Fort Wayne Books, Inc., Donald Grontz personally and as a manager and member of the board of directors of the aforesaid corporations, the other defendants named herein and individuals not known to your plaintiff, in at least two incidents of racketeering activity that have had the same or similar intent, result, accomplice, victim, or method of commission and that as a result of such actions the defendant Erotica House Bookstore, Inc. has received proceeds directly or indirectly derived from a pattern of racketeering activity; and

d) that said corporation has used or invested those proceeds to acquire an interest in real property or to establish or to operate the enterprise; and

e) that through said pattern of activity said corporation has knowingly or intentionally acquired or maintained, either directly or indirectly, an interest or control of real property or an enterprise; and

f) that said corporation has employed Donald Krontz and others not known to your plaintiff who have been employed and associated with the enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise through a pattern of "racketeering activity".

In support thereof your plaintiff further alleges as follows:

1. That Erotica House Bookstore, Inc. is an Indiana corporation which began its corporate existence on the 3rd day of March, 1980, and which has continued in existence up to and including the date of the filing of this complaint.

2. That the Certificate of Incorporation of Erotica House Bookstore, Inc. establishes the name and address of the corporate resident agent for service of process as C T Corporation System and lists its address as 1011 Merchants Bank Building, Indianapolis, Indiana 46204, and that said Articles of Incorporation indicate that the principal office of said corporation and the post office address of the corporation is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

3. That Erotica House Bookstore, Inc. has from 1981 up to and including the date of the filing of this complaint operated its principal activities and acts at 930 Broadway, Fort Wayne, Allen County, Indiana.

4. That on July 1, 1983 and, to the best of yuor petitioner's knowledge, up to the date of the filing of this complaint Donald Krontz was employed by Erotica House Bookstore, Inc. as the manager of said corporation and was simultaneously employed by Cinema Blue of Fort Wayne, Inc. as the manager of that corporation and was employed by Fort Wayne Books, Inc. as the manager of that corporation. That simultaneously Mr. Krontz is and has been a member of the board of directors of all three of said corporations.

5. That on or about the 15th day of June, 1981, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 15th day of June, 1981 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-81-9439, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

6. That on or about the 2nd day of February, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Boardway and that said corporation did on the 2nd day of February, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-2767, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

7. That on or about the 10th day of February, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway and that said corporation did on the 10th day of February, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee Joseph Bickel a/k/a Lee Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-2768, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

8. That on or about the 7th day of June, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 7th day of June, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Anthony L. Leedy, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-14257, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

9. That on or about the 7th day of July, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 7th day of July, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee J. Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-14252, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

10. That on or about the 2nd day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 2nd day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Nancy Schwass a/k/a Nancy L. Johnson, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-14256, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

11. That on or about the 4th day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 4th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee J. Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16919, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

12. That on or about the 10th day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen

County, Indiana at 930 Broadway, and that said corporation did on the 10th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Lee Joseph Bickel, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16918, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

13. That on or about the 18th day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 18th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, Nancy Schwass Johnson a/k/a Nancy L. Johnson, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16924, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

14. That on or about the 25th day of August, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 25th day of August, 1982 violate Indiana Code 35-30-10.1-2 in that its human agent, James P. Harp, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-16922, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

15. That on September 14, 1982 James D. Fry did knowingly distribute obscene matter for consideration in

violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said James D. Fry was convicted by the Allen Superior Court in Cause No. CRM-82-16920 of said violation. That at the time of said offense said James D. Fry was an agent of the corporation acting within his actual authority in the normal course of business at 930 Broadway, Fort Wayne, Indiana, for and on behalf of Erotica House Bookstore, Inc.

16. That on September 14, 1982 James D. Fry did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said James D. Fry was convicted by the Allen Superior Court in Cause No. CRM-82-16921 of said violation. That at the time of said offense James D. Fry was an agent of the corporation acting within his actual authority in the normal course of business at 930 Broadway, Fort Wayne, Indiana, for and on behalf of Erotica House Bookstore, Inc.

17. That on September 28, 1982 James D. Fry did knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2 to a Fort Wayne police officer. That said James D. Fry was convicted by the Allen Superior Court in Cause No. CRM-82-22383 of said violation. That at the time of said offense James D. Fry was an agent of the corporation acting within his actual authority in the normal course of business at 930 Broadway, Fort Wayne, Indiana, for and on behalf of Erotica House Bookstore, Inc.

18. That on or about the 29th day of September, 1982, Erotica House Bookstore, Inc. operated a store in Allen County, Indiana at 930 Broadway, and that said corporation did on the 29th day of September, 1982 violate Indiana

Code 35-30-10.1-2 in that its human agent, James P. Harp, did sell obscene materials to a Fort Wayne police officer and that said corporation was convicted in the Allen Superior Court of said offense in Cause No. CRM-82-222, same being a violation of Indiana Code 35-30-10.1-2, Sale of Obscene Matter.

19. That on or about the 9th day of May, 1983, Erotica House Bookstore, Inc. did employ one Deal L. Maggart, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 9th day of May, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Dean L. Maggart did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Bitch In Control". That said Dean L. Maggart was convicted in Allen Superior Court of said offense in Count I of Cause CR-83-385.

20. That on or about the 11th day of May, 1983, Erotica House Bookstore, Inc. did employ one Dean L. Maggart, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc.

within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 11th day of May, 1983, in the County of Allen and in the State of Indiana then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Dean L. Maggart did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Rubber Bondage". That said Dean L. Maggart was convicted of said offense in the Allen Superior Court in Count II of Cause CR-83-385.

21. That on or about the 3rd day of June, 1983, Erotica House Bookstore, Inc. did employ one Dean L. Maggart, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 3rd day of June, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: That Dean L. Maggart did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Demanding". That said Dean L. Maggart was convicted of said offense in the Allen Superior Court in Count III of Cause CR-83-385.

22. That on or about the 9th day of May, 1983, Erotica House Bookstore, Inc. did employ one Robby D. Woods, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 9th day of May, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Robby D. Woods did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Bizarre Fantasies". That said Robby D. Woods was convicted of said offense in the Allen Superior Court in Count I of Cause CR-83-383.

23. That on or about the 11th day of May, 1983, Erotica House Bookstore, Inc. did employ one Robby D. Woods, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 11th day of May, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Robby D. Woods did then and there unlawfully and knowingly distribute obscene

matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Kinky World". That said Robby D. Woods was convicted of said offense in the Allen Superior Court in Count II of Cause No. CR-83-383.

24. That on or about the 7th day of June, 1983, Erotica House Bookstore, Inc. did employ one Robby D. Woods, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within his actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, did on the 7th day of June, 1983, in the County of Allen and in the State of Indiana, then and there unlawfully and knowingly distribute obscene matter for consideration in violation of Indiana Code 35-30-10.1-2, to-wit: that Robby D. Woods did then and there unlawfully and knowingly distribute obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Bizarre Contacts". That said Robby D. Woods was convicted of said offense in the Allen Superior Court in Count III of Cause CR-83-383.

25. That on or about the 15th day of March, 1984, Erotica House Bookstore, Inc. did employ one white female approximately 5' 6" tall approximately 130#, in her twenties, whose name is believed to be _____, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as

an agent for said Erotica House Bookstore, Inc. within her actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, on or about the 15th day of March, 1984, at the County of Allen, State of Indiana, said employee did then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling two obscene publications, to-wit: a magazine entitled "Cock-Biter" and a magazine entitled "Ass Attack". Said magazines showing male and female human beings engaged in sadomasochistic abuse and sexual activity, without any restrictions which the average person applying contemporary community standards must find that the dominant theme of said alleged matters, taken as a whole, appeal to the prurient interest in sex; and said matter depicts in a patently offensive way sexual conduct; the matter taken as a whole lacks serious literary, artistic, political or scientific value, knowing the above to be true, all of which is contrary to the form of the statute in such cases made and provided. That said material was sold to an officer of the Fort Wayne Police Department.

26. That on or about the 15th day of March, 1984, Erotica House Bookstore, Inc. did employ one Nancy S. Johnson, who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within her actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, on or

about the 15th day of March, 1984, at the County of Allen, State of Indiana, said Nancy S. Johnson did then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling a certain obscene publication, to-wit: a magazine entitled "Dick, Tit, Ass Fucker", the front cover of the same showing a female white and male whites engaged in sexual activity, and on the back cover a female white and male whites engaged in sexual activity, without any restrictions, which the average person applying contemporary community standards must find that the dominant theme of said magazine, taken as a whole, appeal to the prurient interest in sex; and said matter depicts in a patently offensive way sexual conduct; the matter taken as a whole lacks serious literary, artistic, political or scientific value, knowing the above to be true all of which is contrary to the form of the statute in such cases made and provided. That said material was sold to a police officer with the Fort Wayne Police Department.

27. That on or about the 16th day of March, 1984, Erotica House Bookstore, Inc. did employ one female white approximately 5' 6" tall, approximately 130# in her twenties, whose name is unknown but believed to be .....,
who was associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within her actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, on or about the 16th day of March, 1984, at the County of Allen, State of

Indiana, said employee did then and there violate Indiana Code 35-49-3-1 in that she unlawfully and knowingly distributed obscene matter for consideration, to-wit: by selling two obscene publications, to-wit: a magazine entitled "Anal Thrust", the front cover of same showing a male white and a female white engaged in sexual activity and the back cover showing a male white and a female white engaged in sexual activity; and, a magazine entitled "Anal Virgin", the front cover showing sexual activity and carries the words "She learned the hard way" and the back cover showing a male white and female white engaged in sexual activity; said magazines showing sexual activity without any restrictions which the average person applying contemporary community standards must find that the dominant theme of said alleged matters, taken as a whole, appeal to the prurient interest in sex; and said matter depicts in a patently offensive way sexual conduct; the matter taken as a whole lacks serious literary, artistic, political or scientific value, knowing the above to be true, all of which is contrary to the form of the statute in such cases made and provided. Said material was sold to a police officer with the Fort Wayne Police Department.

28. That on or about the 16th day of March, 1984, the enterprise doing business as Erotica House Bookstore, Inc. did employ personnel who were associated with said enterprise and who knowingly or intentionally conducted or otherwise participated in the activities of that enterprise in that while acting as an agent for said Erotica House Bookstore, Inc. within their actual authority and in the normal course of business at said corporation's business address, 930 Broadway, Fort Wayne, Allen County, Indiana, said personnel did then and there vio-

late Indiana Code 35-49-3-1 in that they unlawfully and knowingly exhibited to another person obscene matter on three occasions on said date. By way of example and not limitation, said personnel did allow the use of tokens by police officers for the express purpose of allowing said persons to operate certain "video machines" within said establishment. That Fort Wayne police officers did purchase said tokens from Cinema Blue and view three "motion or video pictures" at Erotica House on said date and that it was the belief of said officers that said motion pictures which they saw were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicted in a patently offensive way sexual conduct; and that the matter in the films taken as a whole lack serious literary, artistic, political or scientific value.

29. That Erotica House Bookstore, Inc. and Mr. Cyrus B. Cooper, in addition to the aforesaid acts, have from the 8th day of June, 1981, up to and including the date of the filing of this complaint, used or allowed to be used the real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana, as a place to offer to distribute, distribute, and exhibit to other persons obscene matter of a similar nature as set forth in this complaint.

30. That Erotica House Bookstore, Inc. and Mr. Cyrus B. Cooper, in addition to the aforesaid acts, have from the 8th day of June, 1981, up to and including the date of the filing of this complaint:

a) used or allowed the use of the real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana, as a place to gather for distribution, display, and offer to others for consideration simi'ar obscene matter and have continued to commit, or to at'empt to commit, or to conspire to commit, or to aid and abet in violation of Indiana Code 35-45-6-2 and Indiana Code 35-30-10.1-2 or Indiana Code 35-49-3-1; and

b) that title to said property is vested in Mr. Cyrus B. Cooper who has from the continued activity of the enterprise received proceeds, directly or indirectly, derived from a pattern of racketeering activity and that said corporation and Mr. Cyrus B. Cooper have used the proceeds derived from such activities to acquire an interest in real property or to establish or to operate an enterprise; and

c) that said corporation and/or Mr. Cyrus B. Cooper have knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of the real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana, and all of the contents therein, or an enterprise; and

d) that said corporation and/or Mr. Cyrus B. Cooper have consistently employed individuals and induced individuals to be associated with an enterprise and have knowingly or intentionally caused those individuals to participate in the activities of that enterprise.

31. That Erotica House Bookstore, Inc. in addition to the aforesaid acts, has from the 8th day of June, 1981, up to and including the date of the filing this complaint, used the real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana, as a place to establish an "enterprise" in that it has associated in fact during said period with Fort Wayne Books, Inc. and Cinema Blue of Fort Wayne, Inc. That on the 6th day of July, 1978, the

application for admission of Cinema Blue of Fort Wayne, Inc., a foreign corporation, to do business in the State of Indiana was filed and approved, such application for admission showing that same is a Delaware corporation who lists its local address as 2441 Broadway, Fort Wayne, Indiana 46807, and which in Article XII designated its resident agent for the purposes of legal process as C T Corporation System, same being located at 1011 Merchants Bank Building, Indianapolis, Indiana 46204. Further, its association in fact is demonstrated by the Certificate of Incorporation of Fort Wayne Books, Inc., which was duly admitted as an Indiana corporation on the 4th day of April, 1979, and whose Articles of Incorporation show that the designated corporate agent for legal process for said corporation is C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204, and that its principal office is 1011 Merchants Bank Building, Indianapolis, Indiana 46204.

WHEREFORE, plaintiff prays the Court for judgment against the defendants, and each of them, as follows:

1. That the Court order the suspension or revocation of any license, permit, or prior approval granted to any of the defendants by any agency of the State;

2. That the Court order the forfeiture of the Charter of each of the defendants which are corporations organized under the laws of the State of Indiana and the revocation of the Certificate authorizing a foreign corporation to conduct business within the state of each of the defendants which are a foreign corporation so as to prevent future criminal activity and to protect the public interests;

3. To find that the defendants have as a "group" conducted an enterprise which has violated Indiana Code 35-45-6-2 and that it is in the public interest to prevent criminal activity that a permanent injunction be ordered against all of the defendants directing them to refrain from further violations of Indiana Code 35-45-6-2;

4. That the Court, in order to make effective its permanent injunction, order the dissolution of the enterprise and impose reasonable restrictions upon the future activities of investments of each and every defendant, including reasonable provisions prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which said defendant was engaged in violation of Indiana Code 35-45-6-2;

5. That the Court order each and every defendant to divest itself of any interest in the enterprise, including all personal and real property;

6. That the Court order the defendants to immediately list and state the location of all property, real or personal, tangible or intangible, including money and bank accounts, of any type, that the defendants own, or have title to, or any right, interest or equity in;

7. That pursuant to Indiana Code 34-4-30.5-3 (a) the Court order the forfeiture of all property, real or personal, tangible or intangible where said property was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of Indiana Code 35-45-6-2:

a) by way of example and not limitation, the State specifically asks for the forfeiture of that certain real estate commonly known as 227 Pearl Street, Fort

Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

b) by way of example and not limitation, the State specifically asks for the forfeiture of that certain real estate commonly known at 930 Broadway, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

c) by way of example and not limitation, the State specifically asks for the forfeiture of that certain real estate commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

8. That the Court order the forfeiture of all bank accounts of Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc.;

9. That the Court subject all personal and real properties, money, intangibles, and corporate interests and activities acquired or maintained in violation of Indiana Code 35-45-6-2 to Court supervision and order the defendants to refrain from disposing of, transferring, relocating, dissipating, or otherwise altering the status of said property, whether real or personal, tangible or intangible, or corporate entities, without prior approval of the Court;

10. Plaintiff prays the Court for an order sequestering and subjecting to Court supervision all bank accounts held by the individual and corporate defendants herein, and that upon a finding for plaintiff, the Court supervise the sale, transfer, or the disposition of all real and personal property, whether tangible or intangible, of said de-

fendant found subject to the act, and for all other relief deemed just and proper in the premises.

Respectfully submitted,

/s/ Stephen M. Sims
Stephen M. Sims
Prosecuting Attorney
38th Judicial Court
State of Indiana

(Certificate of Service omitted in printing.)

IN THE ALLEN CIRCUIT COURT

CAUSE NO. CC84-446

STATE OF INDIANA )
) ss:
COUNTY OF ALLEN )

STATE OF INDIANA AND )
STEPHEN M. SIMS, PROSECUTING )
ATTORNEY FOR THIRTY-EIGHTH )
JUDICIAL CIRCUIT, )
Plaintiff, )
vs. )
)
FORT WAYNE BOOKS, INC., )
CINEMA BLUE OF FORT WAYNE, )
INC., EROTICA HOUSE BOOK- )
STORE, INC., MR. DONALD )
KRONTZ; MR. DONALD KRONTZ )
IN HIS CAPACITY AS MANAGER )
OF FORT WAYNE BOOKS, INC., )
MANAGER OF CINEMA BLUE OF )
FORT WAYNE, INC., MANAGER OF )
EROTICA HOUSE BOOKSTORE, )
INC.; DR. DONALD KRONTZ IN )
HIS CAPACITY AS A MEMBER OF )
THE BOARD OF DIRECTORS OF )
FORT WAYNE BOOKS, INC., )
CINEMA BLUE OF FORT WAYNE, )
INC., EROTICA HOUSE BOOK- )
STORE, INC.; MARK A. BROOKS, )
THE GROUP d/b/a/ EUROPEAN )
INVESTMENTS N V, THE GROUP )
d/b/a THEATRE A CORPORATION, )
NANCY S. JOHNSON, )
CYRUS B. COOPER, )
Defendants. )

## VERIFIED PETITION FOR SEIZURE OF PROPERTY SUBJECT TO FORFEITURE AND PROBABLE CAUSE AFFIDAVIT

Comes now Stephen M. Sims, Prosecuting Attorney for the Thirty-Eighth Judicial Circuit, State of Indiana, and pursuant to Indiana Code 35-4-30.5-3 (b) respectfully moves this Court for an Order directing the Sheriff of Allen County to immediately seize and inventory all property "subject to forfeiture" as set forth in the complaint of your petitioner as heretofore filed in this cause on the 19th day of March, 1984, and in support thereof says as follows:

1. That your petitioner is the duly elected and serving Prosecutor for the Thirty-Eighth Judicial Circuit for the State of Indiana;

2. That your petitioner is, in his capacity as Prosecuting Attorney for said Judicial Circuit, the plaintiff in the above-entitled cause;

3. Your plaintiff hereby incorporates as an integral part hereof all of the allegations set forth in his "Complaint For Injunctive Relief From Corrupt Business Influence And Action For Forfeiture Of Property Incident To Corrupt Business Influence" heretofore filed by him in this cause pursuant to Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3 (a) on the 19th day of March, 1984;

4. The plaintiff believes and has good cause to believe that a "group" or "enterprise" exists in Allen County, Indiana, and is maintaining certain real and personal property which is property used in the course of, intended for use in the course of, property derived from, or real-

ized through, conduct in violation of Indiana Code 35-45-6-2. In particular that the "enterprise" or "group" have used, are using, or plan to use certain real estate, buildings, and the entire contents of said buildings, same having been realized through, derived from, or are being used in the course of, or intended for use in the course of, conduct in violation of Indiana Code 35-45-6-2, in particular, the following real estate and contents:

a) certain real estate commonly known as Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

b) certain real estate commonly known as Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

c) certain real estate commonly known as Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, with all of its contents whether same be real or personal;

The State further asks for the immediate seizure and impoundment of the following personal property:

a) all of the bank accounts located in the State of Indiana in which Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc., have an interest or ownership;

b) all liquid assets located in the State of Indiana in which Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc. have an interest or ownership.

5. That your petitioner incorporates herein as Exhibit "A" the Probable Cause Affidavit executed by Fort Wayne police officer Charles Dennis and suggests to the

Court that said Probable Cause Affidavit, independently or in conjunction with testimony given by said officer on the 19th day of March, 1984, constitutes "probable cause" to believe that a violation of Indiana Code 35-45-6-2 is and has been continuing with regard to that certain real estate, personal property, including bank accounts as specifically set forth in Paragraph 4 of this petition.

WHEREFORE, pursuant to Indiana Code 34-4-30.5-3 (b) and Indiana Code 34-4-30.5-4 (b), your plaintiff prays this Court will enter an Order directing the Sheriff of Allen County to immediately seize that certain real estate, the buildings thereon, and all contents of said buildings commonly known as:

1. Certain real estate commonly known as Fort Wayne, Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana; together with all of its contents whether same be real or personal;

2. Certain real estate commonly known as Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with all of its contents whether same be real or personal;

3. Certain real estate commonly known as Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, with all of its contents whether same be real or personal;

by placing same under seal and inventorying same (as determined reasonable under all circumstances by said Sheriff) and authorizing said Sheriff to remove special items of property if, in his discretion, he deems same appropriate. That officers of the Fort Wayne Police Department be authorized to assist the Sheriff of Allen County in taking custody of any of the personal property or in securing any real property and maintaining same

under seal. Further, that any liquid assets of said three corporations, to-wit: Fort Wayne Books, Inc., Erotica House Bookstore, Inc., and Cinema Blue of Fort Wayne, Inc., within the State of Indiana, be frozen, seized or impounded through seal, pending forfeiture and final disposition of this cause.

The plaintiff further prays that the Court will award expenses and costs of this action and such reasonable attorney fees as the Court may deem appropriate to the Treasurer of Allen County, as a reimbursement to the County for extraordinary expenses and time expenditures involved in this action pursuant to Indiana Code 34-4-30.5-2 (6) and for all other just and proper relief in the premises.

Respectfully submitted,

/s/ Stephen M. Sims
Stephen M. Sims
Prosecuting Attorney
38th Judicial Circuit
State of Indiana

STATE OF INDIANA )
) SS:
COUNTY OF ALLEN )

I affirm under the penalties of perjury that the foregoing Verified Petition For Seizure of Property Subject To Forfeiture is true and accurate to the best of my knowledge and belief.

/s/ Stephen M. Sims
Prosecuting Attorney
38th Judicial Circuit
State of Indiana

(Certificate of Service omitted in printing.)

EXHIBIT "A"

IN THE ALLEN CIRCUIT COURT

CAUSE NO._____

STATE OF INDIANA )
) SS:
COUNTY OF ALLEN )

STATE OF INDIANA )
)
VS. )
)
FORT WAYNE BOOKS, INC. )
CINEMA BLUE OF FORT )
WAYNE, INC. )
EROTICA HOUSE BOOKSTORE, )
INC., MR. DONALD KRONTZ: )
MR. DONALD KRONTZ IN HIS )
CAPACITY AS MANAGER OF )
FORT WAYNE BOOKS, INC., )
MANAGER OF CINEMA BLUE )
OF FORT WAYNE, INC., )
MANAGER OF EROTICA )
HOUSE BOOKSTORE, INC.; )
MR. DONALD KRONTZ IN HIS )
CAPACITY AS A MEMBER OF )
THE BOARD OF DIRECTORS )
OF FORT WAYNE, INC., )
CINEMA BLUE OF )
FORT WAYNE, INC., )
EROTICA HOUSE BOOKSTORE, )
INC.; MARK A. BROOKS, )
THE GROUP d/b/a EUROPEAN )
INVESTMENTS N V, )
THE GROUP d/b/a THEATRE A )
CORPORATION, NANCY S. )
JOHNSON, CYRUS B. COOPER, )
)
Defendants. )

## AFFIDAVIT FOR PROBABLE CAUSE

1. The undersigned swears and affirms, under the penalties for perjury, that he has good cause to believe that:

   From on or about the 8th day of June, 1981, up to and including the 19th day of March, 1984, at the County of Allen and in the State of Indiana, said defendants did as a "group" or "enterprise" knowingly or intentionally receive proceeds directly or indirectly, derived from a pattern of racketeering activity, and that said defendants as a "group" or "enterprise" used or invested those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise; and that through a pattern of "racketeering activity", knowingly or intentionally acquired or maintained, either directly or indirectly, an interest in or control of real property or an enterprise; or operating as a "group" or "enterprise" were employed by or associated with an enterprise, and that said "group" knowingly or intentionally conducted or otherwise participated in the activities of that enterprise through a pattern of racketeering activity; and that said defendants violated Indiana Code 35-30-10.1-2 and Indiana Code 35-49-3-1 and Indiana Code 35-45-6-2.

2. The defendants, respectively, are described as follows:

   a) Fort Wayne Books, Inc. is a "group" or Indiana corporation which began its corporate existence on the 4th day of April, 1979, and which has continued in existence up to and including the date of the filing of this affidavit. Said defendant operates a business at 227 Pearl Street, Fort Wayne, Allen County, Indiana,

and has listed its resident agent as C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204;

b) Cinema Blue of Fort Wayne, Inc., is a "group" or Delaware corporation which received its "Certificate of Admission" to operate in the State of Indiana on the 6th day of July, 1978, and which has continued its operation in the State of Indiana up to and including the date of the filing of this complaint. Said defendant has from 1981 up to and including the date of the filing of this complaint operated a business at 2441 Broadway, Fort Wayne, Allen County, Indiana. It has listed its resident agent for service of process as C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204;

c) Erotica House Bookstore, Inc. is a "group" or Indiana corporation which began its corporate existence on the 3rd day of March, 1980, and which has continued in existence up to and including the date of the filing of this affidavit. That the Erotica House Bookstore, Inc. has from 1981 up to and including the date of the filing of this complaint operated a business at 930 Broadway, Fort Wayne, Allen County, Indiana. That said defendant has listed its resident agent for service of process as C T Corporation System, 1011 Merchants Bank Building, Indianapolis, Indiana 46204;

d) Mr. Donald Krontz, male white, age 26, date-of-birth 7/22/57, subject is approximately 5′ 9″ tall, 215#, complexion medium, build large, hair black, eyes hazel Social Security #313-64-1947, address: 8543 Marsh Road, Algonac, Michigan 48001;

e) Mark A. Brooks, male black, age 29, date-of-birth 3/6/55, Social Security #307-70-1786, address: 1145 Clay Street, Fort Wayne, Indiana 46802;

f) The Group d/b/a European Investments N V, whose last known address is P.O. Box 408, Durand, Michigan 48429;

g) The Group d/b/a Theatre A Corporation, a "group" or corporation whose address is 819 Southeast Second Street, Evansville, Indiana 47713;

h) Nancy S. Johnson, female white, age 45, date-of-birth 2/ /39, subject is approximately 5′ 2″ tall, 119#, Social Security #303-40-2855; business address: 227 Pearl Street, Fort Wayne, Indiana 46802;

i) Cyrus B. Cooper, male white, 4815 Old Mill Road, Fort Wayne, Indiana 46807.

2. That your affiant, Officer Charles Dennis, is a police officer with the Fort Wayne Police Department, Vice Division. That your affiant has from the 7th day of June, 1981, up to and including the date of this affidavit, had vice responsibilities with said Fort Wayne Police Department. That from the 7th day of June, 1981, up to and including the date of the filing of this affidavit, your affiant as a part of his duties with the Fort Wayne Police Department has continuously monitored the general activities of the following group:

a) Fort Wayne Books, Inc. located at 227 Pearl Street, Fort Wayne, Allen County, Indiana;

b) Cinema Blue of Fort Wayne, Inc. located at 2441 Broadway, Fort Wayne, Allen County, Indiana;

c) Erotica House Bookstore, Inc. located at 930 Broadway, Fort Wayne, Allen County, Indiana;

That in his official capacity as a Fort Wayne Police vice officer, your affiant has in the course of his investigation become aware of the following facts:

a) that the "group" or "enterprise" known as Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc. have operated at the addresses set forth hereinbefore con-

tinuously from the 8th day of June, 1981, up to and including the time of the filing of this affidavit;

b) that the defendant corporations or their employees acting in the normal course of business and with actual authority have been convicted by the Allen Superior Court of violations of Indiana Code 35-30-10.1-2 and Indiana Code 35-49-3-1, same being "Distribution of Obscene Matter For Consideration" in such a manner as to constitute a violation of Indiana Code 35-45-6-2.

By way of example, your affiant would show the Court that:

a) that Fort Wayne Books, Inc. did commit a criminal act on the 8th day of June, 1981, and that under Cause No. CRM-81-10113 said corporation was convicted of two counts of distributing obscene matter for consideration. That this criminal activity occurred at 227 Pearl Street, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Alan H. Sedelbauer;

b) that on or about the 15th day of June, 1981, Alan H. Sedelbauer did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Alan H. Sedelbauer was convicted in the Allen Superior Court in Cause No. CRM-81-10114;

c) that on or about the 11th day of February, 1982, Alan H. Sedelbauer did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Alan H. Sedelbauer was convicted in the Allen Superior Court in Cause No. CRM-82-2771;

d) that on or about the 13th day of May, 1982, James D. Fry did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Fry was convicted in the Allen Superior Court in Cause CRM-82-14254;

e) that on or about the 10th day of June, 1982, James D. Harp, did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Harp was convicted in the Allen Superior Court in Cause CRM-82-14255;

f) that on or about the 9th day of August, 1982, Barry W. Dangler, did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Barry W. Dangler was convicted in the Allen Superior Court in Cause No. CRM-82-14253;

g) that Fort Wayne Books, Inc. did commit a criminal act on the 28th day of September, 1982, and that under Cause No. CRM-82-22385 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 227 Pearl Street, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Daniel L. Morgan;

h) that Fort Wayne Books, Inc. did commit a criminal act on the 29th day of September, 1982, and that under Cause No. CRM-82-22386 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 227 Pearl Street, Fort Wayne, Allen

County, Indiana, and that the human agent for the book store was Daniel L. Morgan;

i) that Fort Wayne Books, Inc. did commit a criminal act on the 1st day of December, 1982, and that under Cause No. CRM-82-22452 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 227 Pearl Street, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Anthony L. Leedy;

j) that on or about the 9th day of May, 1983, the 10th day of May, 1983 and the 7th day of June, 1983, Daniel L. Morgan did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Daniel L. Morgan was convicted in the Allen Superior Court in Cause No. CR-83-384;

k) that on or about the 9th and 13th days of May, 1983, and the 3rd day of June, 1983, Mark A. Brooks did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Mark A. Brooks was convicted in the Allen Superior Court in Cause No. CR-83-386;

l) that on or about the 21st day of November, 1983, and the 5th day of December, 1983, Mark A. Brooks did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Mark A. Brooks was convicted in the Allen Superior Court in Cause No. CR-83-513;

m) that Erotica House Bookstore, Inc. did commit a criminal act on the 15th day of June, 1981, and that under Cause No. CRM-81-9439 said corporation was convicted of two counts of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lee Bickel;

n) that Erotica House Bookstore, Inc. did commit a criminal act on the 2nd day of February, 1982, and that under Cause No. CRM-82-2767 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lee Bickel;

o) that Erotica House Bookstore, Inc. did commit a criminal act on the 10th day of February, 1982, and that under Cause No. CRM-82-2768 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lee Bickel;

p) that Erotica House Bookstore, Inc. did commit a criminal act on the 7th day of June, 1982, and that under Cause No. CRM-82-14257 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Anthony L. Leedy;

q) that Erotica House Bookstore, Inc. did commit a criminal act on the 7th day of July, 1982, and that under Cause No. CRM-82-14252 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen

County, Indiana, and that the human agent for the book store was Lee J. Bickel;

r) that Erotica House Bookstore, Inc. did commit a criminal act on the 2nd day of August, 1982, and that under Cause No. CRM-82-14256 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Nancy S. Johnson;

s) that Erotica House Bookstore, Inc. did commit a criminal act on the 4th day of August, 1982, and that under Cause No. CRM-82-16918 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lee J. Bickel;

t) that Erotica House Bookstore, Inc. did commit a criminal act on the 10th day of August, 1982, and that under Cause No. CRM-82-16919 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lee Joseph Bickel;

u) that Erotica House Bookstore, Inc. did commit a criminal act on the 18th day of August, 1982, and that under Cause No. CRM-82-16924 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Nancy Johnson;

v) that Erotica House Bookstore, Inc. did commit a criminal act on the 25th day of August, 1982, and that under Cause No. CRM-82-16922 said corporation was convicted of distributing obscene matter

for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was James D. Harp;

w) that on or about the 14th day of September, 1982, James D. Fry did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Fry was convicted in the Allen Superior Court in Cause No. CRM-82-16920;

x) that on or about the 14th day of September, 1982, James D. Fry did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Fry was convicted in the Allen Superior Court in Cause No. CRM-82-16921;

y) that on or about the 28th day of September, 1982, James D. Fry did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said James D. Fry was convicted in the Allen Superior Court in Cause No. CRM-82-22383;

z) that Erotica House Bookstore, Inc. did commit a criminal act on the 29th day of September, 1982, and that under Cause No. CRM-82-22384 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 930 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was James D. Harp;

aa) that on or about the 9th and 11th days of May, 1983 and the 7th day of June, 1983, Robbie D.

Woods did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Robbie D. Woods was convicted in the Allen Superior Court in Cause No. CR-83-383;

bb) that on or about the 21st and 29th days of November, 1983 and the 13th day of December, 1983, Dean L. Maggart did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Dean L. Maggart was convicted in the Allen Superior Court in Cause No. CR-83-510;

cc) that on or about the 29th day of November, 1983 and the 1st day of December, 1983, Nancy S. Johnson did distribute obscene matter for consideration while acting as an agent for Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Nancy S. Johnson was convicted in the Allen Superior Court in Cause No. CR-83-509;

dd) that on or about the 4th day of February, 1982 Suzanne Krontz did distribute obscene matter for consideration while acting as an agent for Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Suzanne Krontz was convicted in the Allen Superior Court in Cause No. CRM-82-2769;

ee) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 16th day of February, 1982, and that under Cause No. CRM-82-2770 said corporation was convicted of distributing obscene matter for consideration. That this criminal ac-

tivity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Suzanne Krontz;

ff) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 10th day of June, 1982, and that under Cause No. CRM-82-14251 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lloyd C. Ashley;

gg) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 1st day of July, 1982, and that under Cause No. CRM-82-16917 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Lloyd C. Ashley;

hh) that on or about the 8th day of July, 1982, Ronald E. Richards, Jr. did distribute obscene matter for consideration while acting as an agent for Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Ronald E. Richards was convicted in the Allen Superior Court in Cause No. CRM-82-14258;

ii) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 14th day of September, 1982, and that under Cause No. CRM-82-16923 said corporation was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Nancy Johnson;

jj) that Cinema Blue of Fort Wayne, Inc. did commit a criminal act on the 1st day of December, 1982, and that under Cause No. CRM-82-22451 said cor-

poration was convicted of distributing obscene matter for consideration. That this criminal activity occurred at 2441 Broadway, Fort Wayne, Allen County, Indiana, and that the human agent for the book store was Mary K. Krontz;

kk) that on or about the 21st and 29th days of November, 1983, Ronald E. Richards, Jr. did distribute obscene matter for consideration while acting as an agent for Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Ronald E. Richards, Jr. was convicted of Counts I and III in Cause No. CR-83-511 in the Allen Superior Court;

ll) that on or about the 7th day of December, 1983, Ronald E. Richards, Jr. did distribute obscene matter for consideration while acting as an agent for Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Ronald E. Richards, Jr. was convicted of Count II in Cause No. CR-83-511 in the Allen Superior Court;

mm) that on or about the 22nd and 30th days of November, 1983, Mary Kathleen Krontz did distribute obscene matter for consideration while acting as an agent for Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, during the normal course of business and that said Mary Kathleen Krontz was convicted in the Allen Superior Court of two counts in Cause No. CR-83-512.

4. Your affiant, Officer Charles Dennis, swears and affirms that in the course of his investigation he has reviewed all of the aforesaid cause numbers and has personally examined the charging information in each and every one of said charges and in addition thereto has personally examined a certified copy of the guilty

findings in each of said causes. That he has compared photo-copies of each of the charges and of the certified copies, personally inspecting all of same. That he attaches hereto as an integral part of his affidavit true and accurate photo-copies of the charges referred to hereinabove and copies of the findings of the Allen Superior Court in each of same. Said exhibits are marked "A-1 through A-39" inclusive as an integral part hereof.

5. That your affiant in the course of his duty has worked daily with Officer Dennis Anspach. That Dennis Anspach is and has been a member of the Fort Wayne Police Department assigned to the Vice Division and has been with such division for a period of approximately three years. That said Officer Dennis Anspach and your affiant have personally reviewed together a certain certified copy of a guilty plea at which Officer Dennis Anspach was personally present. That said guilty plea was State of Indiana v. Suzanne Krontz, Cause No. CRM-82-2770, State of Indiana v. Mary Kathleen Krontz, Cause No. CRM-82-22451 State of Indiana v. Lloyd C. Ashley, Cause No. CRM-82-16917 and CRM-82-14251, and State of Indiana v. Anthony L. Leedy, Cause No. CRM-82-14257 and CRM-82-22452, and State of Indiana v. Alan H. Sedelbauer, Cause No. CRM-81-10113, and State of Indiana v. James D. Harp, Cause No. CRM-82-16922 and CRM-82-22384 and CRM-82-14255 and CRM-82-05784. That both officers reviewed said certified copy and compared the certified copy with a photo-stat of same, which has been marked as Exhibit "A-40", and your affiant certifies that it is a true and accurate copy of

the guilty plea in the afore-captioned causes which took place on or about the 1st day of July, 1983, in the Allen Superior Court. Said Exhibit "A-40" is attached hereto as a true and accurate representation of what it purports to show as an integral part hereof.

6. Said Exhibit "A-40" demonstrates that Mr. Donald Krontz was an employee of Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc. In addition, said transcript clearly indicates that Mr. Donald Krontz was not only an employee but was the manager of each of said book stores and a member of the board of directors of each of said book stores.

7. That as an integral part of Exhibit "A-40" there was admitted into evidence the Certificate of Incorporation for Fort Wayne Books, Inc. and an action by unanimous consent of the sole members of the board of directors of Fort Wayne Books, Inc. as well as the Certificate of Incorporation for Erotica House Bookstore, Inc. and an action by unanimous consent of the sole members of the board of directors for said Erotica House Bookstore, Inc. and the Certificate of Admission of Cinema Blue of Fort Wayne, Inc. as well as an action by unanimous consent of the sole members of the board of directors of Cinema Blue of Fort Wayne, Inc., which are included herein as Exhibits "A-40, 41, 42, 43, 44, 45, and 46" respectively and your affiant certifies that they are true and accurate copies of those that went into evidence on July 1, 1983. Your affiant knows this because he has personally received the certified transcript and has compared these copies with the certified copy and has compared them in the

presence of Dennis Anspach to confirm their correctness.

8. That your affiant has interacted with other officers who, in checking public records to determine ownership, examined the Allen County Tax Statements of 1982 and 1983 re that certain property known as 227 Pearl Street, Fort Wayne, Allen County, Indiana. That your affiant attaches as Exhibit "A-47" a photocopy showing the party in interest as European Investments N V with a post office address of P.O. Box 408, Durand, Michigan. Further investigation by officers of the Vice Division in a review of the records of Erotica House Bookstore, Inc. show that Erotica House Bookstore, Inc. filed a business tangible personal property return Form 104 indicating that the place for assessment to be mailed for that corporation was: P.O. Box 408, Durand, Michigan 48429. A copy of said business tangible personal property return Form 104 is attached hereto as Exhibit "A-48". The conclusion which your affiant drew from examination of both of said documents indicates that the two entities are "in fact associated".

9. Further investigation by Vice Division officers produced an additional Allen County Tax Statement for 1981 payable 1982, a copy of which is attached hereto, confirming that Erotica House Bookstore, Inc. tax information was forwarded to P.O. Box 408, Durand, Michigan, attachment as Exhibit "A-49".

10. Your affiant swears that on or about the 15th day of March, 1984, he along with other vice officers of the Fort Wayne Police Department did enter that estab-

lishment commonly known as Fort Wayne Books, Inc. at 227 Pearl Street, Fort Wayne, Allen County, Indiana, and did observe one Mark A. Brooks, an employee of said establishment, on duty. That officers of the Fort Wayne Police Department purchased "tokens" from said Mark A. Brooks for the purpose of reviewing certain "video tapes" which are exhibited in said establishment. That your affiant, Officer Charles Dennis, did personally use said tokens to view video films in Booth 9, 10, 12 and 13 in said establishment. Those video booths being at the rear of said establishment. That after viewing said films, it was the belief of said officer that said motion pictures which he observed were obscene in that they depict in a patently offensive way sexual conduct and that the average person applying contemporary community standards would find that the dominant theme of the matter or performance taken as a whole appealed to the prurient interest in sex and that the films separately or jointly, taken as a whole, lacked serious literary, artistic, political or scientific value. That said officer took with him an audio recording device and described the scenes observed at the time that said films were viewed. That said officer has preserved those four audio cassettes and protected their chain of custody until bringing them to court today and they have been marked for evidence purposes as State's Exhibit "50, 51, 52 and 53, respectively".

11. That in addition, on or about the 16th day of March, 1984, your affiant and other Fort Wayne Police Department Vice Division officers did enter that enterprise known as Fort Wayne Books, Inc., 227 Pearl

Street, Fort Wayne, Allen County, Indiana, and did jointly purchase tokens and that said police officers jointly witnessed twelve films and that it was their belief and your affiant's belief that said motion pictures which they saw were obscene in that the average person applying contemporary community standards would find that the dominant theme of the matter of each and every film taken as a whole appealed to the prurient interest in sex and that the matter or performance depicted in a patently offensive way sexual conduct and that the matter in the films taken as a whole lacked serious literary, artistic, political, or scientific value. That the officers recorded their observations on audio equipment at that time and that said audio cassettes have been marked as State's Exhibits "54 through 65, inclusive". That said cassettes have been unaltered and have been preserved in the custody of the Vice Division of the Fort Wayne Police Department until brought to court on this date. That said twelve tapes, as well as Exhibits 50 through 53, inclusive, are true and accurate representations of what they purport to show.

12. That your affiant is aware that Fort Wayne Police Department Vice Officers working as a part of his division checked Allen County Tax Statements with regard to that certain property commonly known as 2441 Broadway, Fort Wayne, Allen County, Indiana. That a copy in the name of Theatre A Corporation, 819 Southeast Second Street, Evansville, Indiana 47713, and a true and accurate copy of said Tax Statement is included herein as Exhibit "A-66".

13. That on or about the 15th day of March, 1984, your affiant accompanied other officers of the Fort Wayne Police Department Vice Division to that real estate commonly known as Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana. That your affiant and other police officers used "tokens" and observed six films at said establishment. That it is the opinion of your affiant, who viewed three of said films, and Officer Joe DiFilippo, who viewed three of said films, that each and every one of said films seen on said "video machines" at said establishment were obscene in that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance in said films, taken as a whole, appeal to the prurient interest in sex; and that the matter or performance in each of said films depicted in a patently offensive way sexual conduct; and that the matter in each of said films, taken as a whole, lack serious literary, artistic, political or scientific value. That your affiant and Officer Joe DiFilippo carried with them a recording device and orally described what they observed on the screen in each said case and that the audio tapes have been preserved by the Fort Wayne Police Department Vice Division and remain unaltered and a true and accurate representation of what they purport to show. That they are attached hereto as Exhibits "A-67 through 72, inclusive".

14. That on or about the 16th day of March, 1984, your affiant personally went to the same establishment,

that is Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, and viewed an additional two films. That those films were, in the opinion of your affiant, obscene in that it is his belief from his experience that the average person, applying contemporary community standards, would find both of said films appeal to the prurient interest in sex; and that the matter or performance depicted in each of said films in a patently offensive way sexual conduct; and that the matter in each film, taken as a whole, lacked serious literary, artistic, political or scientific value. That your affiant has preserved by means of audio descriptions taken at the time, two tapes describing the actions on those films, and that they are attached hereto in unaltered form as true and accurate representations of what they purport to show. State's Exhibits "73 and 74".

15. That your affiant, through investigation with other police officers of the Fort Wayne Police Department, has found that records indicate that Cyrus B. Cooper has an interest in that real estate commonly known as 930 Broadway, Fort Wayne, Allen County, Indiana.

16. That on March 15, 1984, your affiant went to that certain establishment called Erotica House Bookstore, Inc. at 930 Broadway, Fort Wayne, Allen County, Indiana, and did use "tokens" provided by the enterprise to view three video tapes or movies at said establishment. That at the time your affiant viewed said films, he carried with him an audio recorder whereby he did, on separate tapes, record what he

was observing with regard to said three films. That it is the belief of your affiant that each of said three films are pornographic inasmuch as they appeal to the prurient interest in sex and that the average person, applying contemporary community standards, would find that the dominant theme of the matter or performance of each of said films taken as a whole, appeal to the prurient interest in sex; and that the matter or performance depicts in a patently offensive way sexual conduct and that the matters in each film, taken as a whole, lack serious literary, artistic, political or scientific value. Your affiant has preserved intact said three tapes and has caused them to be marked as State's Exhibit "75, 76 and 77" herein. That each tape fairly and accurately depicts what it purports to show.

At the time your affiant entered the Erotica House Bookstore, Inc. on said date, he observed a Fort Wayne police officer purchase a magazine entitled "Cock Biter" and an additional magazine entitled "Ass Attack". In addition, your affiant observed one Nancy S. Johnson, an employee of said establishment, sell a magazine to an undercover vice officer, said magazine was entitled "Dick, Tit, Ass-Fucker". That your affiant has reviewed the chain of custody of all three magazines, placed his initials in each of said magazines for later identification. That he has brought with him to this Honorable Court said three magazines intact from the Vice Division custody and marked same as State's Exhibit "78, 79 and 80" inclusive.

17. That on or about the 16th day of March, 1984, your affiant observed vice officers of the Fort Wayne Police Department purchase two magazines in the normal course of business from that certain enterprise known as Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana. Said magazines were entitled "Anal Thrust" and "Anal Virgin". Your affiant marked same with his initials for later identification. That the chain of custody has been preserved on same and he has brought those magazines with him for review by this Court as State's Exhibit "81 and 82" respectively.

18. That it is the belief of your affiant that all of the magazines purchased and alluded to heretofore in this affidavit are obscene and constitute a violation of Indiana Code, that is "Distribution of Obscene Matter for Consideration", inasmuch as it is the opinion of your affiant, after having reviewed all of said magazines, that they depict individually sexual activity without any restrictions which the average person applying contemporary community standards would find that the dominant theme of said alleged matters, taken as a whole, appeal to the prurient interest in sex; and that said matters depict in a patently offensive way sexual conduct; and that each magazine individually, taken as a whole, lacks serious literary, artistic, political, or scientific value.

19. That your affiant personally examined that certain establishment known as Fort Wayne Books, Inc., and Cinema Blue of Fort Wayne, Inc. on this the 19th day of March, 1984. That he has found from his visit

on this day, and the observation of a film at each of said establishments, that the basic nature of their business has remained the same as he has observed it from time to time from June 8, 1981, to present.

20. That your affiant has on this the 19th day of March, 1984, personally visited the Erotica House Bookstore, Inc. and has observed the said premises and has observed the purchase of a certain magazine entitled "____ ____ ____ ____ ____" That from the personal observations of this establishment it is the opinion and belief of your affiant that the basic nature of said establishment's business has remained unaltered from June 8, 1981, up to and including the present time. Your affiant has caused his initials to be placed in the magazine which was purchased on this the 19th March, 1984, and has kept said magazine in his visual observation from the time of its purchase until entering this Honorable Court. In reviewing said magazine, it is the belief of your affiant that said magazine constitutes a "distribution of obscene matter for consideration" in that it depicts sexual activity without any restrictions which the average person applying contemporary community standards must find that the dominant theme of such alleged material, taken as a whole, appeals to the prurient interest in sex; and that said matter depicts in a patently offensive way sexual conduct; that the matter taken as a whole lacks serious literary, artistic, political or scientific value. That said magazine has been marked for identification purposes as State's Exhibit "83".

21. That the source of the information which your affiant has related hereinabove in this affidavit is his

direct observation of these places of business from June 8, 1981, up to and including the present day, his direct review of court records, police files, and information gathered by his fellow officers pursuant to a joint investigation in which he has taken an active and uninterrupted part from June 8, 1981 to the present time.

Further your affiant sayeth naught.

/s/ Charles Dennis. Affiant

STATE OF INDIANA )
) SS:
COUNTY OF ALLEN )

Subscribed and sworn to before me this 19th day of March, 1984.

/s/ Gloria E. Trueblood, Notary Public
Resident of Allen County, Indiana

My Commission Expires:
August 30, 1987.

(Exhibits omitted in printing.)

IN THE ALLEN CIRCUIT COURT

CAUSE NO. 84-446

STATE OF INDIANA )
) ss:
COUNTY OF ALLEN )

| | |
|---|---|
| STATE OF INDIANA AND STEPHEN M. SIMS, PROSECUTING ATTORNEY FOR THIRTY-EIGHTH JUDICIAL CIRCUIT, Plaintiff, vs. FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC., MR. DONALD KRONTZ; MR. DONALD KRONTZ IN HIS CAPACITY AS MANAGER OF FORT WAYNE BOOKS, INC., MANAGER OF CINEMA BLUE OF FORT WAYNE, INC.; MANAGER OF EROTICA HOUSE BOOKSTORE, INC.; MR. DONALD KRONTZ IN HIS CAPACITY AS A MEMBER OF THE BOARD OF DIRECTORS OF FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC. EROTICA HOUSE BOOKSTORE, INC.; MARK A. BROOKS, THE GROUP d/b/a EUROPEAN INVESTMENTS N V, THE GROUP d/b/a THEATRE A CORPORATION, NANCY S. JOHNSON, CYRUS B. COOPER, Defendants. | ORDER (Filed March 19, 1984) |

Comes now the Prosecuting Attorney of the 38th Judicial Circuit, Stephen M. Sims, and files his Complaint For Injunctive Relief From Corrupt Business Influence and Action For Forfeiture of Property Incident to Corrupt Business Influence pursuant to Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3 (a) and comes now the Prosecuting Attorney and files his Petition for Seizure of Property Incident to Corrupt Business Influence pursuant to Indiana Code 34-4-30.5-3 and submits therewith a "Probable Cause Affidavit" as part thereof, which are in the following words and figures:

(H. I.)

And the Court having examined said petitions and probable cause affidavit and having heard evidence on same NOW FINDS THAT:

1. That said petitions and probable cause affidavit comply with requirements of Indiana Code 34-4-30.5-2 and Indiana Code 34-4-30.5-3;

2. That the Court having reviewed said petitions and probable cause affidavit and having heard evidence on same finds pursuant to Indiana Code 34-4-30.5-3 and Indiana Code 34-4-30.5-2;

a) That the Prosecuting Attorney for the 38th Judicial Circuit has filed an action for forfeiture of any property used in the course of, intended for the use in the course of, derived from or realized through conduct in violation of Indiana Code 35-45—6-2;

b) That said action was brought in the Allen Circuit Court, which has proper jurisdiction of same;

c) That the Prosecutor has properly filed a petition for property "subject to forfeiture" to be seized by a law enforcement agency, and has simultaneously filed a proper probable cause affidavit;

d) That the probable cause affidavit submitted with said petition for seizure of "property subject to forfeiture" does in and of itself establish probable cause and the Court now finds that there is probable cause that Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., Erotica House Bookstore, Inc., and the other defendants, have formed an enterprise that is and has violated Indiana Code 35-45-6-2 and that said defendants have used the following specific real property, the buildings thereon and all of the contents of said buildings for actual use in the course of, or intended use in the course of, or that same have been derived from, or realized through, conduct in violation of Indiana Code 35-45-6-2:

i) Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building;

ii) Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building;

iii) Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with the building and all of the contents of said building.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The Sheriff of Allen County is ordered to seize that property "subject to forfeiture" which is commonly known as:

a) Fort Wayne Books, Inc., 227 Pearl Street, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

b) Cinema Blue of Fort Wayne, Inc., 2441 Broadway, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

c) Erotica House Bookstore, Inc., 930 Broadway, Fort Wayne, Allen County, Indiana, together with the building thereon and all of the contents of said building, real or personal;

2. That pursuant to Indiana Code 34-4-30.5-4 (b), the Sheriff of Allen County is directed to make such seizure immediately upon receipt of this Order and may make such seizure in one or more of the following manners:

a) Place the property under seal;

b) Remove the property or any part thereof to a place designated by the Court; or

c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

3. The Sheriff of Allen County is specifically authorized to use officers under his command to effectuate this Order as well as any Fort Wayne police officers allowed to him by the Fort Wayne Police Department;

4. The defendants, Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc., are ordered by this Court to avoid removing any liquid assets now in the State of Indiana from the State of Indiana, or from dissipating any bank accounts or secreting same until further order of this Court.

ALL OF WHICH IS ORDERED THIS 19TH DAY OF MARCH, 1984.

/s/ Thomas L. Ryan
Judge, Allen Circuit Court

IN THE ALLEN CIRCUIT COURT

CAUSE NO. CC-84-446

(Title omitted in printing.)

REQUEST FOR EXTENSION OF TIME

(Filed April 16, 1984)

The Defendants, DONALD KRONTZ, MARK A. BROOKS, and NANCY S. JOHNSON, by counsel, respectfully request an extension of time to respond to the Plaintiffs' Complaint, for the reason that the undersigned counsel needs additional time in which to investigate the facts of the matter for the purpose of forming an intelligent and proper response to the Complaint filed on March 19, 1984.

WHEREFORE, said Defendants, DONALD KRONTZ, MARK A. BROOKS, and NANCY S. JOHNSON, by counsel, respectfully move for an extension of time of 30 days within which to respond to the Complaint to and including May 16, 1984.

LEBAMOFF LAW OFFICES

By: /s/ Kenneth R. Scheibenberger
Kenneth R. Scheibenberger
918 South Calhoun Street
Fort Wayne, IN 46802
Telephone: 219/423-2581

ATTORNEYS FOR DEFENDANTS,
DONALD KRONTZ, MARK A. BROOKS,
and NANCY S. JOHNSON.

IN THE ALLEN CIRCUIT COURT

CAUSE NO. CC-84-446

STATE OF INDIANA )
) SS:
COUNTY OF ALLEN )

| | |
|---|---|
| STATE OF INDIANA AND STEPHEN M. SIMS, PROSECUTING ATTORNEY FOR THIRTY-EIGHTH JUDICIAL CIRCUIT, Plaintiff, | ) |
| vs. | ) |
| FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC., MR. DONALD KRONTZ; MR. DONALD KRONTZ IN HIS CAPACITY AS MANAGER OF FORT WAYNE BOOKS, INC., MANAGER OF CINEMA BLUE OF FORT WAYNE, INC.; MANAGER OF EROTICA HOUSE BOOKSTORE, INC.; MR. DONALD KRONTZ IN HIS CAPACITY AS A MEMBER OF THE BOARD OF DIRECTORS OF FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC.; MARK A BROOKS, THE GROUP d/b/a EUROPEAN INVESTMENTS N V, THE GROUP d/b/a THEATRE A CORPORATION, NANCY S. JOHNSON, CYRUS B. COOPER, Defendants. | ) ORDER |

BE IT FURTHER REMEMBERED that afterwards, to-wit: on the 18th day of April, 1984, the following proceedings were had in the above entitled action before the Honorable Judge aforesaid, to-wit:

* * *

The Court, being duly advised in the premises now makes and enters the following finding, ruling, orders and judgment thereon, namely:

Court considers and DENIES in their entirety Defendants', Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc.:

1. Motion for Stay Pending Appeal filed April 3, 1984.

2. The Assignment of Error and;

3. Motion for Stay Pending Appeal filed April 12, 1984.

COURT GRANTS:

1. The Petition to Certify filed April 3, 1984 and the Supplemental Petition to *Crtify* filed April 12, 1984.

* * *

The Court files its written order of certification pursuant to App. Rule 4(B)(6).

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IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

NO. 4-1283-A-415

(Title omitted in printing.)

REQUEST FOR EXPEDITIOUS RULING ON MOTION FOR STAY (MODIFICATION) FILED APRIL 27, 1984

TO: The Chief Judge of the Court of Appeals and the Associate Judges:

COME NOW Fort Wayne Books, Inc., Cinema Blue of Fort Wayne, Inc., and Erotic House Bookstore, Inc., defendants-appellants (hereinafter "Movants") in Case No. 3-484-A-106, consolidated with Case No. 4-1283-A-415 under the latter number by this Honorable Court on May 2, 1984, and respectfully move this Honorable Court to rule expeditiously on Movants' Motion for Stay (Modification) heretofore filed on April 27, 1984. In support of this Motion for Expeditious Ruling, Movants respectfully allege the following:

1. On or about March 19, 1983, plaintiff-appellee Stephen Sims, District Attorney for the Thirty-Eighth Judicial Circuit, and those in active concert with him, pursuant to the purported authority of orders issued by the Honorable Thomas L. Ryan, Judge of the Allen Circuit Court, sequestered all of the contents of Movants' bookstores and theaters. The said contents seized under provisions of the Indiana State Civil RICO statute, included tens of thousands of books, magazines and films as well as neutral mechanical items such as projectors, cash registers, and bookracks. Movants' locations were also sealed

at and from the time of sequestration with access to them denied to Movants' employees and the general public. Movants' businesses were and have been completely closed. The sole bases for the Civil RICO allegations were alleged violations of the state obscenity laws, some of which had resulted in final criminal convictions.

2. Movants promptly sought relief in the court below, all of which was sequentially denied; the last of such denials was on April 18, 1984.

3. Thereafter, Movant perfected an interlocutory appeal and prepared a Motion for Stay (Modification) pending appeal and filed said pleadings in this Honorable Court on April 27, 1984.

4. On May 2, 1984, plaintiff-appellee Sims, through counsel, filed a Verified Petition for Transfer of Case to the Supreme Court of Indiana in connection with the Fort Wayne matter (Case No. 3-484-A-106). On May 4, 1984, this Honorable Court *sua sponte*, issued an order consolidating the Fort Wayne case with a similar case, *4447 Corporation, World Wide Video Systems, Issi Theatre Corporation, Plaza Entertainment Center and Burton Gorelick v. Stephen Goldsmith*, (case No. 4-1283-A-415) then and now pending in this Honorable Court. The cases were consolidated under the number of the latter case. The *4447 Corporation* litigation involved a similar use of the Indiana Civil RICO statutes to sequester and padlock a bookstore and had been extensively briefed in this Honorable Court. It also had been the subject of a special hearing on an appellant's Motion for Stay, resulting in the granting by this Honorable Court of the requested Stay on February 6, 1984.

5. Shortly after this Honorable Court's consolidation of the two appeals, counsel for plaintiffs-appellees in the consolidated cases (all plaintiffs-appellees were and are represented in this Honorable Court by Linley Pearson, Attorney General for the State of Indiana, by Thaddeus Perry, Deputy Attorney General) filed a Verified Petition for Transfer, of Case(s) to the Supreme Court of Indiana Apparently, the filing of said Petition(s) to Transfer automatically divests this Honorable Court of any jurisdiction over the subject litigation. Accordingly, this Honorable Court could not consider Movants' pending Motion for Stay (Modification), pending resolution of the Petition(s) to Transfer by the Honorable Supreme Court.

6. On July 17, 1984, the Honorable Supreme Court of the State of Indiana issued an Order denying plaintiff-appellees' Petition(s) for Transfer and remanding the causes to this Honorable Court for all purposes. The Honorable Supreme Court did not decide the Motion for Stay (Modification) which was before it during the pendency of the Petition(s) to Transfer, but instead, in its Order of July 17, 1984 denying the Petition(s) to Transfer, remanded it to this Honorable Court for decision.

7. As of the date of the instant motion, Movants' Motion for Stay (Modification) has not been decided. The affected bookstores and theaters have been closed for all purposes for nearly six months. Tens of thousands of unlitigated books, films and magazines have been seized and withheld from the public. Movants have suffered obvious business losses and are now facing loss of governmental licenses as a consequence of being closed (See, letter from Fort Wayne—Allen County Board of Public

Health, attached hereto as Exhibit A). Additionally, the First Amendment rights of both Movants and the public have been totally curtailed at the subject locations during this nearly six month period of *forced, ex parte,* (and presumably) *interim,* closure.

8. As of the date of the instant motion, plaintiff-appellees' have filed *no* opposition to Movants' Motion for Stay (Modification). The sole pleadings filed to date by plaintiff-appellees are the aforesaid Verified Petitions for Transfer [which addressed the merits of neither the Motion for Stay (Modification) nor the underlying interlocutory appeal] and a Brief of Appellees in conjunction with the appeal.

9. The said Brief of Appellees (filed in this Honorable Court on or about July 19, 1984) is silent with respect to Movants' Motion for Stay (Modification). It neither opposes the said motion nor discusses it an any other way. The brief (it is only four pages) Brief forthrightly states that

> "[T]he facts herein are almost identical with those of *4447 Corporation et al v. Goldsmith,* the other case with which this case has been consolidated." Brief of Appellees State of Indiana and Stephen Sims, page 2.

The Brief discusses two factual distinctions between Movants' case and the earlier case with which it has been consolidated, but concludes that

> " . . . these two consolidated cases are essentially the same . . . " *Ibid,* page 3.

Based on the stated essential similarity to the earlier filed consolidated case, appellees herein

> " . . . incorporate[d] by referenced those portions of the Brief . . . in *4447 Corporation v. Goldsmith,* filed

in this Court on January 18, 1984, under Cause No. 1283A415 (sic) . . . . " *Ibid* page 3.

Thus, for all practical purposes, appellees have treated the two cases as legally identical, and, in fact, they are. The incorporated *Goldsmith* Brief neither opposed nor otherwise discussed the stay sought (and later granted) in that case.

10. The sole additional discussion in appellees' Brief herein focuses on their erroneous characterization of the subject of a recent Ninth Circuit decision, *J-R Distributors v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984) as a

> " . . . nuisance abatement statute aimed at forestalling the repetition of objectionable conduct (i.e. dissemination of obscenity)." *Ibid* at page 3.

In fact, although the statute therein at issue was denominated a "moral nuisance" law, no injunctive provisions were either present or considered. The Court held unconstitutional a civil fine provision

> " . . . which is premised in part on profits 'attributable to the moral nuisance' [and which] may be based on profits from the *sale of protected materials* in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there . . . . [The Court held] that it is impermissible in an anti-obscenity statute, to provide that the amount of a fine shall be based, even in part, on the proceeds from constitutuionally protected material." 725 F.2d at 494.

The Court's holding is, of course, apposite to the case at bar in that the enunciated constitutional doctrine bars the forfeiture of constitutionally protected materials or proceeds or assets derived from the sale of constitutionally protected materials regardless of the prior sale of unpro-

tected materials at the same or a related location. Appellees' entire premise in the case at bar is that all materials, items and assets used at a location at which two disseminations of obscene materials have occurred may be forfeited under the Indiana Civil RICO statute, along with the proceeds from *all* materials sold there. The Ninth Circuit's opinion in *J-R Distributors v. Eikenberry* specifically rejects appellees' theory as unconstitutional. Rehearing *en banc* in *J-R Distributors v. Eikenberry* was denied unanimously by the Ninth Circuit on July 5, 1984.

11. Given the failure of appellees herein to offer any opposition to Movants' Motion for Stay (Modification) in the nearly sixth months which have elapsed since its filing date, the finality of this Honorable Court's Order of February 6, 1984 granting a similar Motion for Stay in conjunction with the *4447 Corporation* matter (see paragraph 4, *supra*), and the conceded similarity of Movants' case and the *4447 Corporation* case, it is respectfully submitted that that Movants' pending Motion for Stay (Modification) should be decided expeditiously and granted.

12. Movants and their counsel well recognize the tremendous burdens facing this Honorable Court and other appellate courts in this the most litigious period in the history of our society. We recognize that the competing and frequently strident demands on the judiciary may frequently be nearly overwhelming. Nonetheless, given this Honorable Court's previously issued stay order, the long period of time which has elapsed since Movants' Motion for Stay (Modification) was filed, the irreparable injury suffered since March of 1984 by Movants' and the ongoing and severe harm to transcendent First Amendment concerns, we respectfully take this extraordinary step to re-

quest that this Honorable Court issue its Order modifying the Order of the Court below without further delay.

13. Counsel is, of course, available on short notice to participate in oral argument if such would be of assistance to this Honorable Court. To the extent that prior argument in conjunction with the previously issued Stay is deemed sufficient, then such would respectfully appear to substantiate the validity of Movants' request for the expeditious issuing of an Order granting their Motion for Stay (Modification) herein.

Respectfully submitted,

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By /s/ Franklin I. Miroff
Attorneys for Appellants

(Exhibit and Certificate of Service omitted in printing.)

IN THE
COURT OF APPEALS OF INDIANA

---

No. 4-1283-A-415

(Title omitted in printing.)

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## RESPONSE TO REQUEST FOR EXPEDITIOUS RULING ON MOTION FOR STAY

Come now the Appellees, State of Indiana and Stephen M. Sims, by their counsel, Linley E. Pearson, Attorney General of Indiana, by his Deputy, Arthur Thaddeus Perry, and in response to Appellants' Request for Expeditious Ruling on Motion for Stay, states as follows:

1. This case is already fully briefed.

2. Since one of the conditions for a stay is likelihood of success on the merits, the Court would have to consider the merits in any event.

3. Judicial efficiency would best be served, therefore, by proceeding to the case itself.

4. Appellees' Brief makes clear that Appellants cannot prevail on the merits of this case.

5. A stay should therefore be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ Arthur Thaddeus Perry
Deputy Attorney General

Attorneys for Appellees

(Certificate of Service omitted in printing.)

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IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

| | | |
|---|---|---|
| FORT WAYNE BOOKS, INC., CINEMA BLUE OF FORT WAYNE, INC., and EROTICA HOUSE BOOK-STORE, INC., | ) | |
| Appellants, | ) | |
| vs. | ) | CAUSE NO. 4-1283-A-415 |
| STATE OF INDIANA and STEPHEN M. SIMS, Prosecuting Attorney for the THIRTY EIGHTH JUDICIAL CIRCUIT, | ) | (Filed April 4, 1985) |
| Appellees. | ) | |

ORDER

The Appellants, having heretofore filed herein their Motion for Stay (Modification) of Interlocutory Injunction Without Bond Pending Appeal; and thereafter, this case and another case known as 4447 Corporation, et al. v. Stephen Goldsmith, et al., which presented common questions of law were consolidated; and a stay in the 4447 Corporation similar to the stay requested in this case was granted; and thereafter the Appellees filed a Verified Petition for Transfer of the consolidated cases to the Supreme Court of Indiana, where the consolidated cases pended until the Supreme Court denied the appellees' Petition for Transfer and remanded the consolidated cases to this

Court; as a result of the denial of transfer, the stay in the 4447 Corporation case remains in effect pending the appeal or the further order of this Court; thereafter the Appellants renewed their previously filed Motion for Stay, and now the Court, being duly advised, taking judicial notice of its own records in this case and particularly of the Order of Stay heretofore issued in the 4447 Corporation case, now finds that the Appellants' Motion for Stay in the above-captioned case should be granted, Conover, J., dissenting.

IT IS THEREFORE ORDERED that the Order heretofore entered by the Allen Circuit Court, the Honorable Thomas L. Ryan, Judge, presiding, in Cause Number CC84-446 of said Court, dated March 19, 1984, is hereby modified and ordered to conform with the stay heretofore made and entered in the 4447 Corporation case, pending the further order of this Court, in the following respects:

A. That the Sheriff of Allen County and/or the Fort Wayne Police Department shall forthwith unlock, unseal and release all property within the commercial building at 227 Pearl Street, Fort Wayne, Allen County, Indiana, 2441 Broadway, Fort Wayne, Allen County Indiana and 930 Broadway, Fort Wayne, Allen County Indiana, which property had heretofore been locked, sealed and secured pursuant to the Order of the Allen County Circuit Court, filed March 19, 1984 and in accordance therewith, shall forthwith return all the personal property removed from the above-specified commercial buildings on March 30, 1984, as more fully set out in the inventory filed with the Allen Circuit Court on April 4, 1984; and

B. Defendants shall preserve all property at 227 Pearl Street, Fort Wayne, Allen County, Indiana, 2441 Broadway, Fort Wayne, Allen County, Indiana and 930 Broadway, Fort Wayne, Allen County, Indiana, until further order of this Court; defendants shall not transfer or remove from said building any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of this court. This paragraph shall not prevent defendants at 227 Pearl Street, Fort Wayne, Allen County, 2441 Broadway, Fort Wayne, Allen County, Indiana and 930 Broadway, Fort Wayne, Allen County, Indiana from exhibiting, transferring or selling books, magazines, newspapers, motion picture films or videotapes. However, until further order of this court, all other property shall be held by the defendants.

A written opinion on the merits of the appeal will imminently follow this order.

ORDERED this 4th day of April, 1985.

/s/ Paul H. Buchanan, Jr.
CHIEF JUDGE

INDIANA COURT OF APPEALS

Cause No. 4-1283-A-415

Opinion, *4447 Corporation, et al. v. Goldsmith*
(Printed as Appendix C to
Certiorari Petition, Cert. App. 28-98.)

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INDIANA SUPREME COURT
Cause No. 29S04-8703-CV-270

Opinion, *4447 Corporation, et al. v. Goldsmith*
(Printed as Appendix A to
Certiorari Petition, Cert. App. 1-19.)

Denial of Rehearing, *4447 Corporation, et al. v. Goldsmith*
(Printed as Appendix E to
Certiorari Petition, Cert. App. 105-112.)

GOLDSMITH v. 4447 CORPORATION, et al.

RELEVANT DOCKET ENTRIES

| Date of Filing | MARION CIRCUIT COURT |
|---|---|
| 8/ 1/83 | [Complaint]<br>Comes now the plaintiff and files verified petition for seizure of property subject to forfeiture.<br><br>[Court upon *ex parte* hearing issues] findings of fact and order [for seizure of property]. |
| 8/ 4/83 | Come now defendants by counsel and file motion to dismiss, memo of law in support of motion to dismiss, motion to strike and/or expunge *ex parte* order of seizure, . . . motion to continue, motion for change of venue.<br><br>Comes now plaintiff and files verified petition for seizure of property subject to forfeiture. Motion for change of venue granted. |
| 8/18/83 | Venue to Hamilton County. |
| | HAMILTON CIRCUIT COURT |
| 9/ 8/83 | Comes now the Plaintiff, by counsel, and files Amended Complaint. |
| 9/12/83 | Come now defendants, 4447 Corporation, et al., and file Motion To Vacate Order Filed August 1, 1983 and Memorandum Of Law In Support Of Motion. |
| 9/13/83 | Comes now the Defendant, 4447 Corporation, and files Motion To Continue [Deposition]. |
| 9/29/83 | Motion to Modify Order filed August 1, 1983 Pending Disposition of Motion To Vacate. |
| 10/ 5/83 | Comes now plaintiff by counsel, and files its Motion for Continuance of hearing [of Defendants' Motion To Vacate Seizure Order]. |

10/ 7/83 Plaintiff's Motion for Continuance granted.

10/25/83 Comes now the defendant, 4266 W. 38th Street, Corporation, by counsel, and files its Renewed Motion To Modify Order Filed August 1, 1983, Objection To Continuance Of Hearing Date And Opposition To Motion To Strike.

10/28/83 Comes now the plaintiff, by counsel, and files Memorandum Of Law In Opposition To Motion To Dismiss And To Motion To Vacate Court's [Seizure] Order.

11/15/83 Defendant's Reply Memorandum in Support of Motion To Dismiss Complaint And Motion to Vacate [Seizure] Order.

11/21/83 Court having taken under advisement matters in November 18, 1983 hearing now enters Order [denying motions to dismiss and to vacate seizure order].

12/ 1/83 Comes now the defendant, Burke H. Mendenhall, by counsel, and files his Trial Rule 12(B)(6) and 12(E) Motion to Dismiss Complaint.

12/ 5/83 Motion for Stay Pending Appeal filed by Corporate Defendants and Burton Gorelick, is hereby denied.

12/15/83 Motion to Dismiss

2/ 3/84 Court of Appeals decision filed [granting stay of seizure pending appeal].

8/20/84 Come now defendants, by counsel, and file Jury Demand.

8/22/84 Defendants' Demand for Trial by Jury is hereby denied.

8/29/84 Plaintiff by counsel files Answer of Defendant Burke H. Mendenhall and Mendenhall's Motion for Separate Trial.

9/14/84 Comes now the plaintiff, and files Answer In Opposition To Motion For Separate Trial.

| | |
|---|---|
| 9/24/84 | Motion for Separate Trials filed by Defendant, B. Mendenhall, is denied. |
| 1/30/85 | Come now 4447 Corporation, World Video Systems, ISSI Theatre Corporation, Plaza Entertainment Center and Burton Gorelick, by counsel and file Motion to Vacate Trial Setting and to Defer Further Proceedings Pending Finality of Interlocutory Appeal. |
| 2/ 7/85 | Defendant's Motion to Vacate Trial Setting and to Defer further proceedings is hereby denied. |
| 2/25/85 | Comes now the Court of Appeals and issues the enclosed order [for stay of proceedings pending appeal]. |
| 2/26/85 | Motion for Continuance granted as per Order. Cause to be reset at a later date when Stay Ordered by Indiana Court of Appeals is lifted. |
| [6/12/85] | [Opinion of Court of Appeals filed.] |
| 3/ 3/87 | Opinion from [Indiana] Supreme Court filed. |

IN THE CIRCUIT COURT OF MARION COUNTY
CAUSE NO. C83 1788

STATE OF INDIANA )
) ss.
COUNTY OF MARION )

STEPHEN GOLDSMITH, PROSECUTING ATTORNEY FOR NINETEENTH JUDICIAL CIRCUIT,

Plaintiff,

vs.

4447 CORPORATION,
WORLD VIDEO SYSTEMS, INC.
ISSI THEATRE INC.,
BURTON GORELICK d/b/a
ADULT TOY AND GIFT,
DISK DEVELOPMENT,
BURKE MENDENHALL,
IVAN CHALFIE,
HENRY KAHN,
BARBARA BYRNES,
HERBERT ALLEN,
JAMES LEWELLYN,
ROGER SUMMERS,
EUGENE YARMY,
GEORGIA MYERS,
HERB TROUT,
PLAZA ENTERTAINMENT CENTER,
CYNTHIA SMITH,
LAURIE JACOBS,
WILLIAM E. LONG,
ROBERT BEAMAN,

Defendants,

(Filed CC Aug. 1, 1983)

Bernard J. Gohmann, Jr., Clerk

## COMPLAINT

1. Stephen Goldsmith, as Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, brings this civil action for injunctive and other relief, under the Indiana Racketeer Influence and Corrupt Organization Statute ("R.I.C.O" Action) 35-45-30.5-1, et. seq. Indiana Code (1982), alleging as follows:

### Jurisdiction

2. Jurisdiction of this matter is conferred upon this Court by I. C. 34-4-30.5-2.

### Statutory Authority

3. The statutory authority relied upon by Plaintiff in this case is the Racketeer Influenced and Corrupt Organizations Act (R.I.C.O.) I. C. 35-45-6-1 - 35-45-6-2, Indiana Code, 1982 and Civil Procedure Code Special Proceedings Civil Remedies for Racketerring Activity I.C. 34-4-30.5-1 - 34-4.30.5-6.

### Parties

4. Plaintiff, Stephen Goldsmith, is the duly elected Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana. The Prosecuting Attorney is authorized to bring this action by I. C. 34-4-30.5-2.

5. The defendants, 4447 Corporation d/b/a World Video Systems, Inc., is a retail video store located at 4447 North Keystone Avenue, Indianapolis, Marion County, Indiana. The defendant, 4447 Corporation, is an Indiana Corporation and said corporation was incorporated on April 22, 1983.

6. The defendant, World Video Systems, Inc. is an Indiana Corporation located at 6801 East 38th Street, Indianapolis, Marion County, Indiana.

7. The defendant, I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift, is a retail video store and bookstore located at 6755 East 38th Street, Indianapolis, Marion County, Indiana. The defendant, I.S.S.I. Theatre, Inc. is a Delaware corporation, and said corporation was admitted to do business in the State of Indiana on June 5, 1978.

8. The defendant, 4447 Corporation, d/b/a World Video Systems, Inc. operates at 4447 North Keystone Avenue in Marion County, Indiana and I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift at 6755 East 38th Street in Marion County, Indiana, for the purpose of selling, distributing or showing or offering to sell, distribute or show, or have in its possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic or masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose; Said corporations knowingly write, print, publish or utter, or cause to be written, printed, published, or uttered, advertisements or notices of various kinds, giving information, directly or indirectly, stating or purporting to state, where or whom, or by what means any,

or what purports to be any, such material, matter, article, or thing of any such character, can be purchased, obtained, or had. Said corporations in any manner knowingly hires, employs, uses or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above.

9. The defendants, Ivan M. Chalfie and Henry Kahn d/b/a Disk Development Company, are a real estate firm located at 9566 Allisonville Road, Indianapolis, Marion County, Indiana. The defendant, Disk Development Company, owns the real estate at 4447 North Keystone, the location of the defendant, 4447 Corporation d/b/a World Video Systems, Inc. retail video store.

10. The defendant, Burton Gorelick, is a resident of the State of Michigan. The defendant, Burton Gorelick, is the real property owner of the lots at 6755 E. 38th Street, Indianapolis, Marion County, Indiana, the location of defendant, I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift.

11. The defendant, Burke Mendenhall, is a resident of the State of Indiana. The defendant, Burke Mendenhall is the real property owner of 4276 W. 28th Street, the location of defendant, Plaza Entertainment Center.

12. The defendants, Cynthia Smith, Laurie Jacobs, William E. Long and Robert Beaman, are all residents of the State of Indiana. All of the defendants named above were, at all times relevant herein, either employed by or associated with an enterprise, and all of the above-named defendants did conduct or participate directly or indirectly , in such enterprise through a pattern of racketeering activity as is more fully set forth herein.

The Burton Gorelick Enterprise

13. Plaintiff, Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, brings this lawsuit pursuant to I. C. 34-4-30.5, alleging that Burton Gorelick and all of the individual and corporate defendants named above did form an illegal enterprise, consisting of all of the above-named persons, whose funtions in said enterprise include ownership, operation, management or employment by the corporations named herein.

14. The purpose of this enterprise is alleged to be, by Plaintiff, to operate in Marion County, Indiana "adult bookstores", which bookstores operate for the purpose of selling, distributing, or showing, or offering to sell, distribute or show, or have in its possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose.

15. Said enterprise knowingly writes, prints, publishes or utters or causes to be written, printed, published or uttered advertisements or notices, giving information directly or indirectly, stating, or purporting to state, where, how, or whom or by what means any or what purpose to be any, such material, matter, article, or thing of any such character can be purposed, obtained or had.

16. Said enterprise knowingly hires, employs, uses or permits persons to do or assist in doing either knowingly or innocently, acts in violation of I. C. 34-4-30.5-2 and I. C. 35-45-6-2(3).

17. In addition to the above, said enterprise, by and through its corporations, owners, managers, and employ-

ees, distributes obscene materials on a daily basis, knowing the obscene nature thereof, in that said enterprise, by and through its corporations, owners, managers, and employees, sells, exhibits, or otherwise disseminates to other persons, obscene material or said enterprise offers to do so on said enterprise possesses such material with intent to do so in violation of I. C. 34-4-30.5-2 and 35-45-6-2-(3).

Facts and R. I. C. O. Violations

18. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 14 above and further alleges and follows:

19. Beginning on or about June 5, 1978 and continuing up to, and including, August 1, 1983, and at diverse times and between said dates, all the above-named defendants were employed by or associated with, The Gorelick Enterprise, and all the above named defendants did conduct or participate, directly or indirectly, in said enterprise, through a pattern of racketeering activity as is more fully set forth below, to-with:

a. All of the above-named defendants did engage in at least two incidents of racketeering conduct in that each defendant did at least twice between said dates, knowingly sell, distribute or show or offer to sell, distribute or show, or have in its or his possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose;

b. said defendants did knowingly, between the above-referenced dates, write, print, publish or utter, or cause to be written, printed, published or uttered, advertisements or notices, giving information which stated or purported to state, where, how, of whom, or by what means any, what purported to be any such material, matter, article, or thing of any such character could be purchased, obtained, or had;

c. said defendants did knowingly between the above-referenced dates, hire, employ, use or permit any person to do or assist in doing, either knowingly or innocently, the acts or things mentioned above with each separate incident set forth above being in violation of I. C. 35-30-10.1-2.

d. each separate incident set forth above constitutes a violation of I. C. 35-30-10.1-2, and any two such incidents set forth above in addition to any one of the incidents set forth previously constitutes violations of I. C. 35-45-6-2 (a)(3).

e. All of the above-named defendants did, between the above-referenced dates, own, operate, manage, maintain employment with, The Gorelick Enterprise, and more specifically, each of the above-named defendants were, and/or, are employed by, or associated with the Gorelick Enterprise, as defined and identified herein.

f. All of the above-named defendants did conduct or participate, directly or indirectly, in The Gorelick Enterprise as set forth above through a pattern of racketeering activity in violation of I. C. 35-45-6-2(a)(3) in that they engaged in two or more incidents of said racketeering conduct which had the same or similar intents, results,

accomplices, victims, methods or commission or other interrelated incidents of the same kind each.

g. Further, the defendants, 4447 Corporation d/b/a World Video Systems, Inc., I.S.S.I. Theatre Corp. d/b/a Adult Toy and Gift, and Burton Gorelick did, in violation of I. C. 35-30-10.1-1 and I. C. 35-30-10.1-2 and I. C.. 35-45-6-2(a)(3) in any manner, knowingly hire, employ, use or permit any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, more specifically the defendants named in this paragraph did knowingly hire, employ, use or permit Barbara Byrnes, Herbert Allen, James Lewellyn, Roger Summers, Eugene Yarmy, Georgia Meyers, Herb Trout, Cindy Smith, Laurie Jacobs, William E. Long, Robert Beaman, and other persons whose identities are unknown to the plaintiff at this time to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, with each such incident being in violation of I. C. 35-30-10.1-2. Any two such incidents set forth in this paragraph or with any one of such incidents set forth in this paragraph, in addition to any one of the incidents set forth in any other paragraph in this allegation, constitute violation of I. C. 35-45-6-2(a)(3).

Further, plaintiff alleges that all of the above acts or incidents did take place in Marion County, Indiana.

20. Based upon the above, and the information provided by the agents of the Indianapolis Police Department who have been conducting the investigation of The Gorelick Enterprise, plaintiff believes that The Gorlick Enterprise will continue to operate in violation of R.I.C.O. statutes, unless the below sought relief is granted.

WHEREFORE, because defendants have conducted or participated in an enterprise through a pattern of racketeering activity in violation of I. C. 35-45-6, and upon information and belief, will continue to engage in such activities unless substantial penalties are imposed by this Court, plaintiff respectfully requests that this Court grant the following relief:

1. Pursuant to I. C. 34-4-30.5(2) immediately enjoin defendants and their agents, employees, representatives or assigns from further violations of I. C. 35-45-6-2(a)(3) and I. C. 35-30-10.1-2.

2. Order defendants to immediately list and state the location of all property, real and personal, including money, that defendants own or have title to or any right, interest or equity in;

3. Immediately subject all personal and real properties, money, intangibles, and corporate interest and activities acquired or maintained in violation of the R.I.C.O. Act to Court supervision, and order defendants to refrain from disposing of, transferring, relocating, dissipating, or otherwise altering the status of said properties or corporate entities without prior approval of the Court.

4. Pursuant to I. C. 34-4-30.5-2(1) order all defendants to divest themselves of any interest in any and all enterprise, including real property.

5. Pursuant to I. C. 34-4-30.5-3(a) order forfeiture of all property and other things of value, real or personal, including money, used in the course of, intended for us in the course of, derived from or realized through conduct in violation of I. C. 35-45-6-2.

6. Pursuant to I. C. 34-4-30.5-2(4) order the suspension or revocation of a license, permit, or prior approval granted to defendants by any agency of the State.

7. Pursuant to I. C. 34-4-30.2(5) order the forfeiture of the charter of those defendant corporations organized under the laws of the State of Indiana or where appropriate, revocation of the certificates authorizing a foreign corporation to conduct business within the state.

8. Pursuant to I. C. 35-45-6 permanently enjoin defendants and their agents, employees, representatives or assigns from engaging in the activities described herein that are shown to violate I. C. 35-46-6 and I. C. 34-4-30.5.

9. Pursuant to I. C. 34-4-30.5-3 order institution or forfeiture proceedings for all property, real or personal, including money, used in the course of, derived from, or realized through, conduct in violation of I. C. 35-45-62(3).

Plaintiff asks that this Court immediately sequester and subject to Court supervision all bank accounts held by the individual and corporate defendants herein, and supervise the sale, transfer, or the dispositions of any real or personal properties by said defendants, and for all other just and proper relief in the premises.

/s/ J. Gregory Garrison
Deputy Prosecuting Attorney for the
Nineteenth Judicial Circuit

/s/ Philip R. Blowers

Deputy Prosecuting Attorney for the
Nineteenth Judicial Circuit

(Certificate of Service Omitted in Printing.)

IN THE CIRCUIT COURT OF MARION COUNTY

CAUSE NO. C83 1788

(Title omitted in printing)

(Filed CC Aug. 1, 1983)

Bernard J. Gohmann, Jr., Clerk

VERIFIED PETITION FOR SEIURE OF PROPERTY SUBJECT TO FORFEITURE

Comes now the plaintiff, in person and by counsel, and petitions the Court for seizure of property pursuant to statute, and in support of said petition would show the Court as follows:

1. He is the duly elected and serving Prosecutor for the Nineteenth Judicial Circuit, including Marion County, Indiana.

2. That he is the plaintiff in the above-entitled cause.

3. The plaintiff hereby incorporates by reference thereto, all of the allegations set forth in the Complaint of the plaintiff, as filed in this cause on the 1st day of August, 1983.

4. The plaintiff believes and has good cause to believe that the defendants, and each of them, by and through the corrupt enterprise defined and identified in the Complaint, possess, with intent to distribute, and in fact, distribute, various obscene materials as more completely identified in said Complaint. Said materials are obscene because and for the reason that they explicitly depict acts of sexual contact between members of the same and opposite sexes, including oral, anal and genital contact. Plain-

tiff believes and has good cause to believe that said materials are obscene as defined by the statutes of the State of Indiana for the reason that they are patently offensive, intended and calculated to appeal to a prurient interest, and are without significant literary, artistic, social, scientific or educational value. The plaintiff has extensive knowledge of a continuing and on-going investigation by agents for the Indianapolis Police Department of the racketeering activity described in the Complaint of the plaintiff. Evidence discovered in that investigation was a product of investigation by Detective Sgt. Thomas R. Rodgers, Detective Sgt. assigned to the Vice Branch, Indianapolis Police Department. The Affidavit of Sgt. Rodgers is attached hereto, made a part hereof, and marked as Plaintiff's Exhibit A.

5. The affidavit of Sgt. Rodgers, Exhibit A herein, establishes probable cause to believe that a violation of the Criminal Racketeering Influenced Criminal Organizations Statute, I. C. 35-45-6-2, has occurred, involving property located at 4276 West 38th Street, Indianapolis, Indiana. The defendant, 4447 Corporation, doing business as Plaza Entertainment Center, has constructed a facility in furtherance of the racketeering activity described in the Complaint of the plaintiff, at 4276 West 38th Street, doing business under the name and style of Plaza Entertainment Center. Said facility is constructed for the purposes of and calculated for the use in said racketeering activity, being the continued dissemination of obscene material. (Affidavit of Rodgers, Exhibit A). As of the date of the signing of this petition, said facility has been prepared for opening, and agents for the defendants have stated to Detective Rodgers by and through his investigators, that

said facility shall be open for business August 1, 1983. The premises located at 4276 West 38th Street contain numerous and multiple items of an obscene nature, possessed by the defendants named in the above entitled action with the intent to distribute those in furtherance of their continuing criminal activity as identified in said Complaint. The possession of such articles as are described herein, including those described in the affidavit of Sgt. Rodgers, constitute a probable cause showing that a violation of the Racketeering Statutes as set forth herein have occurred and are continuing to occur.

Pursuant to I. C. 34-4-30.5-3 (b) the Court is required to issue an Order, upon such probable cause showing, ordering appropriate law enforcement agencies to seize the property contained in the location described above, 4276 W. 38th Street. The Court may either order seizure by requiring law enforcement agencies, the agency of Indianapolis Police Department, to take possession of all merchandise and materials found therein, or, as provided in 34-4-30.5-4(b)(1) by placing said property under seal.

WHEREFORE, the plaintiff prays that the Court will enter and issue an Order authorizing and directing the appropriate agencies for the Indianapolis Police Department to seize all property contained in and around the premises located at 4276 W. 38th Street, to place the same under seal, to cause the same to be locked, and to deny admittance to any person other than appropriate law enforcement personnel, to said premises pending further order of this Court.

The plaintiff further prays that the Court will award the expenses and costs of this action and such reasonable

attorney's fees as the Court may deem appropriate to the plaintiff, all pursuant to 34-4-30.5-2(6), and for all other just and proper relief in the premises.

/s/ Philip R. Blowers
Deputing Prosecuting Attorney
for the Nineteenth
Judicial Circuit
560 City County Building
Indianapolis, Indiana 46204
Telephone: 236-3522

## VERIFICATION

I affirm under the penalties of perjury that the representations contained in the foregoing Verified Petition for Seizure of Property Subject to Forfeiture are true.

/s/ Philip R. Blowers
Philip R. Blowers, Deputy
Prosecuting Attorney for the
Nineteenth Judicial Circuit

PLAINTIFF'S EXHIBIT A

AFFIDAVIT

I, THOMAS R. ROGERS, believe or have reason to believe based upon personal knowledge and creditable hearsay information the following:

On July 25, 1983, I went into the Adult Toy and Gift Shop located at 6753 E. 38th Street. Upon entering, I could see that the business had for sale on display differenet types of sexually oriented material. Immediately within the store is a display of sexually explicit magazines, video tapes, eight millemeter films and sexual aid devices. I went to the 8 mm film section and a clerk by the name of William E. Long, Jr. unlocked the display cabinet and handed me the films that I had selected; two films that revealed sexual depictions on the cover that contained the film. I asked Long if the films inside were new and did they depict the same thing that was on the cover. He answered that they did and told me each film was $12.95 plus tax. I purchased both films, entitled "Anal Madness" and "Spin the Bottle". A review of the two films revealed that both films depicted men and women in sexual intercourse and deviate sexual conduct. I then went to the "live peep" section within the store and entered a "conversation booth". Then I picked up the telephone a spoke to a female identified as "Shawn". Shawn directed me to put some money in the coin operated device that operated the lights. I did so and the lights came on her side of the booth. Shawn, advised me for a tip she would get naked for me. I gave her a tip and she took off all of her clothing and layed on the floor of the booth spreading her legs and genitals apart with her fingers, exposing her private

parts and anus. She began to masterbate and continued to do so until the time ran out on the coin device that operated the lights.

I then went to World Video located at 4447 N. Keystone and upon entering, I could see that they had for sale many X-rated video tapes and 8 mm films. I spoke to a clerk by the name of Lori Jacobs in regards to a video tape entitled "Hot Summer Night" that was on display for $79.95. I asked her if that was the price and she said I could probably get it cheaper if I would talk to the manager. I asked about the "8 mm" films that were on display behind the counter. I selected two films entitled "Afternoon Delight" and "Sexual Negotiations" and asked Jacobs if the films depicted the same thing that was depicted on the cover of the film. The cover featured men and women engaged in explicit sexual conduct. I was advised by Jacobs that the price of the film was $10.95 plus tax. I was about to pay for them when another female by the name of Cynthia Smith came from the back room and I asked if she was the manager. She said she was and I asked her about discounting the video tape entitled "Hot Summer Night". She said that I probably wouldn't like that film because she saw it and said "it was pretty rough." She liked things a little more gentle. She then told me that I could have it for $40.60. I then paid for the two 8 mm films and left to go call for a uniformed police officer to identify the two women I had just talked to. Officer John Ferguson arrived and went in to talk to Lori Jacobs and Cynthia Smith. Smith told Officer Ferguson that she was opening a new store at 38th and Lafayette Road and named the number of movie booths the new store was going to have, and other features of the store.

A review of the two films I purchased from the "World Video" revealed that both films depicted men and women engaged in sexual intercourse and deviate sexual conduct.

On July 26, 1983 I went back to the "Adult Toy and Gift Shop" located at 6753 E. 38th Street and purchased two more films entitled "Big Load" and "Gyro Sex". This time the purchase was made from a Robert Beaman. A review of the films revealed that both films depicted men and women engaged in sexual intercourse and deviate sexual conduct. On this same day, Detective Steve Verplank went to the "World Video" and purchased the video tape entitled "Hot Summer Night". A review of this tape found that it depicted four men forcing a young female to perform oral sex, sexual intercourse and beating the woman with a belt. This officer has retained possession of all materials as stated in the incidents above. Said materials are attached here as exhibits hereto in sealed paper containers. Containers denominated Exhibits A, B, C and D.

On July 29, 1983, Detective Joseph Brannon went into the Plaza Entertainment Center, located at 4276 W. 38th Street. The business appeared to be open. However, when Detective Brannon entered the business he could see that there were several construction workers working on the building. He told me that there were magazines, films and other sexually oriented materials for sale.. He asked a worker if they were open yet, and the worker said not until Monday, implying August 1, 1983. The worker then showed Detective Brannon the "live peep" section within the store, and the mini theatre section within the

store. The worker told Brannon that the theatre section was not completed, but was expected to be finished by December.

This affiant has conducted numerous investigations into businesses of this nature and I have reasonable belief that Adult Toy and Gift Shop and World Video are owned and operated by an enterprise consisting of various corporations and individuals named in the Complaint attached hereto (specifically rhetorical paragraphs 5 through 17) in a manner violative of I. C. 35-30-10.1-2 and the provisions of the Indiana R.I.C.O. Act. This affiant has personally seen various papers, records, applications and other documents concerning both World Video and Adult Toy and Gift that would support this belief and this, together with statements made to this officer and other officers of the Indianapolis Police Department, would lead this affiant to believe that Plaza Entertainment Center is a part of the enterprise that operates Adult Toy and Gift and World Video adult bookstores, under common ownership or control.

All of the events described above occurred in Marion County, Indiana.

/s/ Thomas R. Rodgers
Detective Sgt.,
Indianapolis Police Department

Subscribed and sworn to before me this 1 day of August, 1983.

/s/ D. J. Daniels
Deputy Prosecuting Attorney
Nineteenth Judicial Circuit

(Certifice of Service omitted in printing.)

IN THE MARION COUNTY CIRCUIT COURT
CAUSE NO. C83-1788

(Title omitted in printing.)

FILED

AUG 4 1983

/s/ Bernard J. Gohmann, Jr.
Clerk

## MOTION TO CONTINUE

Comes now the Defendant 4447 Corporation, and moves the Court to continue as follows:

1. That the matter is set for hearing on August 4, 1983.

2. That there has been only seventy-two (72) hours notice in order to prepare.

3. That there are substantial constitutional issues involved, including, but not limited to the First Amendment, the Fourteenth Amendment, due process provisions as well as State constitutional issues.

4. That in order properly brief and request the appropriate relief it will be necessary to present to the Court appropriate citations, briefs and authority for each of the issues involved.

5. That this Court has already taken *drastic* measures in issuing a preliminary injunction without a hearing, *ex parte*, without notice; such action being subject to review and briefing as well.

WHEREFORE, Defendant prays for an Order from this Court continuing this matter and for all other just and proper relief in the premises.

Respectfully submitted,

TAYLOR & RUBIN, P.C.
By /s/ Stephen M. Taylor

(Certificate of Service omitted in printing.)

IN THE CIRCUIT COURT OF MARION COUNTY
CAUSE NO. C83-346

STATE OF INDIANA )
) SS:
COUNTY OF MARION )

(Title omitted in printing.)

FILED
SEP 8 1983

/s/ Helen Porter
Clerk Hamilton Circuit Court

AMENDED COMPLAINT

1. Stephen Goldsmith, as Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, brings this civil action for injunctive and other relief, under the Indiana Racketeer Influenced and Corrupt Organization statute ("R.I.C.O. Action) 34-4-30.5-1 et seq. Indiana Code (1982) alleging as follows:

Jurisdiction

2. Jurisdiction of this matter is conferred upon this Court by I. C. 34-4-30.5-2 and 3.

Statutory Authority

3. The statutory authority relied upon by Plaintiff in this case is the Racketeer Influenced and Corrupt Organizations Act (R.I.C.O.) I.C. 35-45-6-1 - 35-45-6-2, Indiana Code, 1982 and Civil Procedure Code Special Proceedings Civil Remedies for Racketeering Activity I.C. 34-4-30.5-1 - 34-4-30.5-6.

Parties

Plaintiff, Stephen Goldsmith, is the duly elected Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana. The Prosecuting Attorney is authorized to bring this action by I.C. 34-4-30.5-2.

4. The defendants, 4447 Corporation d/b/a World Video Systems, Inc., is a retail video store located at 4447 North Keystone Avenue, Indianapolis, Marion County, Indiana. The defendant, 4447 Corporation, is an Indiana corporation and said corporation was incorporated on April 22, 1983.

5. The defendant, World Video Systems, Inc., is an Indiana corporation located at 6801 East 38th Street, Indianapolis, Marion County, Indiana.

6. The defendant I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift, is a retail video store and bookstore located at 6755 East 38th Street, Indianapolis, Marion County, Indiana. The defendant, I.S.S.I. Theatre, Inc. is a Deleware corporation, and said corporation was admitted to do business in the State of Indiana on June 5, 1978.

7. The defendants, Ivan M. Chalfie and Henry Kahn d/b/a Disk Development Company, are a real estate firm located at 9566 Allisonville Road, Indianapolis, Marion County, Indiana. The defendant, Disk Development Company, owns the real estate at 4447 North Keystone, the location of the defendant, 4447 Corporation d/b/a World Video Systems, Inc. retail video store.

8. The defendant, Burton Gorelick, is a resident of the State of Michigan. The defendant, Burton Gorelick, is the real property owner of the lots at 6755 E. 38th Street,

Indianapolis, Marion County, Indiana, the location of the defendant, I.S.S.I. Theatre, Inc. d/b/a Adult Toy and Gift.

9. The defendant, Burke Mendenhall, is a resident of the State of Indiana. The defendant, Burke Mendenhall is the real property owner of 4276 W. 38th Street, the location of the defendant, Plaza Entertainment Center.

10. The defendants, Cynthia Smith, Laurie Jacobs, William E. Long and Robert Beaman, are all residents of the State of Indiana. All of these defendants, at all times relevant herein, were either employed by or associated with an enterprise in Marion County, and all of the above-named defendants have conducted or participated directly or indirectly, in such enterprise through a pattern of racketeering activity as is more fully set forth herein.

The Burton Gorelick Enterprise

11. Plaintiff, Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, brings this lawsuit pursuant to I.C. 34-4-30.5, alleging that Burton Gorelick and all of the individual and corporate defendants named above did form an illegal enterprise, consisting of the above-named persons, whose function in said enterprise have included ownership, operation, management or employment by the corporations named herein, for the purpose of economic gain, through said racketeering activity.

12. The purpose of this enterprise is to operate, in Marion County, Indiana, "adult bookstores," which bookstores operate for the purpose of selling, distributing, or showing or offering to sell, distribute or show, or have

in its possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose.

13. Said enterprise knowingly writes, prints, publishes or utters or causes to be written, printed, published or uttered advertisements or notices, giving information, directly or indirectly, stating, or purporting to state, where, how, or whom or by what means any or what purpose to be any, such material, matter, article, or thing of any such character can be purchased, obtained or had.

14. Said enterprise knowingly hires, employs, uses or permits persons to do or assist in doing either knowingly or innocently, acts in violation of I.C. 34-4-30.5-2 and I.C 35-45-6-2(3).

15. In addition to the above, said enterprise, by and through its corporations, owners, managers, and employees, distributes obscene materials on a daily basis, knowing the obscene nature thereof, in that said enterprise, by and through its corporations, owners, managers, and employees, sells, exhibits, or otherwise disseminates to other persons, obscene material or said enterprise offers to do so or said enterprise possesses such material with intent to do so in violation of I.C. 34-4-30.5-2 and 35-45-6-2(3).

Facts and R.I.C.O. Violations

16. Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 15 above and further alleges as follows:

17. Beginning on or about June 5, 1978 and continuing up to, and including, August 1, 1983, and at diverse times and between said dates, all the above-named defendants were employed by or associated with, the Gorelick Enterprise, and all of the above named defendants did conduct or participate, directly or indirectly, in said enterprise, through a pattern of racketeering activity as is more fully set forth below, to-wit:

a. All of the above-named defendants, as participants in the enterprise, did engage in at least two incidents of racketeering conduct in that each defendant did at least twice between said dates, knowingly sell, distribute or show or offer to sell, distribute or show, or have in its or his possession, custody or control with intent to sell, distribute, show or advertise in any manner, obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic books, magazines, periodicals, newspapers, photographs, motion picture films, or articles or instruments of indecent use or purpose;

b. Said defendants did knowingly, as participants in the enterprise, between the above-referenced dates, write, print, publish or utter, or cause to be written, printed, published or uttered, advertisements or notices, giving information which stated or purported to state, where, how, of whom, or by what means any, what purported to be any such material, matter, article, or thing of any such character could be purchased, obtained, or had;

c. Said defendants did knowingly, as participants in the enterprise, between the above referenced dates hire, employ, use or permit any person to do or assist in doing, either knowingly or innocently, the acts or things men-

tioned above with each separate incident set forth above being in violation of I.C. 35-30-10.1-2.

d. Each separate incident set forth above constitutes a violation of I.C. 35-30-10.1-2, and any two such incidents set forth above in addition to any one of the incidents set forth previously constitutes violations of I.C. 35-45-6-2 (a)(3).

e. All of the above-named defendants did, between the above-referenced dates, own, operate, manage, maintain employment with, the Gorelick Enterprise, and more specifically, each of the above-named defendants were, and/or, are employed by, or associated with the Gorelick Enterprise, as defined and identified herein.

f. All of the above-named defendants did conduct or participate, directly or indirectly, the the Gorelick Enterprise as set forth above through a pattern of racketeering activity in violation of I.C. 35-45-6-2(a)(3) in that they engaged in two or more incidents of said racketeering conduct which had the same or similar intents, results, accomplices, victims, methods or commission or other interrelated incidents of the same kind each.

g. Further, the defendants, 4447 Corporation d/b/a World Video Systems, Inc., I.S.S.I. Theatre Corp. d/b/a Adult Toy and Gift, and Burton Gorelick did, in violation of I.C. 35-30-10.1-1 and I.C. 35-30-10.1 and I.C. 35-45-6-2 (a)(3), knowingly hire, employ, use or permit persons to do or assist in doing, either knowingly or innocently any act or thing mentioned above, more specifically the defendants named in this paragraph did knowingly hire, employ, use or permit Barbara Byrnes, Herbert Allen, James

Lewellyn, Roger Summers, Eugene Yarmy, Georgia Meyers, Herb Trout, Cindy Smith, Laurie Jacobs, William E. Long, Robert Beaman, and other persons whose identities are unknown to the plaintiff at this time, to do and assist in doing, either knowingly or innocently, acts mentioned above, with each such incident being in violation of I.C. 35-30-10.1-2. Any two such incidents set forth in this paragraph, in addition to any one of the incidents set forth in any other paragraph in this allegation, constitute violation of I.C. 35-45-6-2(a)(3).

18. Based upon the above, and information provided by the agents of the Indianapolis Police Department who have been conducting the investigation of The Gorelick Enterprise, plaintiff believes that The Gorelick Enterprise will continue to operate in violation of R.I.C.O. statutes, unless the below sought relief is granted.

WHEREFORE, the plaintiff prays for judgment against the defendants, and each of them, as follows:

1. Order defendants to immediately list and state the location of all property, real and personal, including money that defendants own or have title to or any right, interest or equity in;

2. Subject all personal and real properties, money, intangibles, and corporate interest and activities acquired or maintained in violation of the R.I.C.O. Act to Court supervision, and order defendants to refrain from disposing of, transferring, relocating, dissipating, or otherwise altering the status of said properties or corporate entities without prior approval of the Court.

3. Pursuant to I.C. 34-4-30.5-2(1) order all defendants to divest themselves of any interest in any and all enterprise, including real property.

4. Pursuant to I.C. 34-4-30.5-3(a) order forfeiture of all property and other things of value, real or personal, tangible and intangible, including money, used in the course of, intended for use in the course of, derived from or realized through conduct in violation of I.C. 35-45-6-2.

5. Pursuant to I.C. 34-4-30.5-2(4) order the suspension of a license, permit, or prior approval granted to defendants by any agency of the State.

6. Pursuant to I.C. 34-4-30.5-2(5) order the forfeiture of the charter of those defendant corporations organized under the laws of the State of Indiana or where appropriate, revocation of the certificates authorizing foreign corporations to conduct business within the state.

Plaintiff asks that this Court sequester and subject to Court supervision all bank accounts held by the individual and corporate defendants herein, and supervise the sale, transfer or the disposition of any real or personal properties by said defendants, and for all other just and proper relief in the premises.

/s/ J. Gregory Garrison
Deputy Prosecuting Attorney for
the Nineteenth Judicial Circuit
City County Building, Room 560
Indianapolis, Indiana 46204

(CERTIFICATE OF SERVICE omitted in printing)

IN THE HAMILTON COUNTY CIRCUIT COURT
CAUSE NO. C83-346

(Title omitted in printing)

STATE OF INDIANA )
) ss:
COUNTY OF HAMILTON )

(Filed September 13, 1983)

MOTION TO CONTINUE

Comes now the Defendant, 4447 CORPORATION, by counsel, Franklin I. Miroff, and moves the Court for a continuance of the deposition as follows:

1. That this matter is substantial and complex.

2. That there are substantial and difficult Fifth Amendment issues.

3. That the Defendant's counsel has just been contacted regarding the depositions.

4. That it is necessary to have at least two (2) weeks to prepare for these depositions.

5. That counsel conflicts on his calendar in that he is trying *Hughes -vs- Hughes* in Marion County Superior Court, Civil Division, Room #3 and *Haberman -vs- Haberman* in Marion County Superior Court, both on September 15, 1983, and it will be impossible for the other counsel to be there on such short notice.

6. That several of the attorneys are from another state and those counsel need at least two to three weeks notice.

WHEREFORE, the Defendant, by counsel, prays for an Order from this Court continuing the deposition and for all other just and proper relief in the premises.

Respectfully submitted,
ANCEL, MIROFF & FRANK, P.C.

By: /s/ Franklin I. Miroff

(CERTIFICATE OF SERVICE omitted in printing)

IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

| | | |
|---|---|---|
| 4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATRE CORPORATION, PLAZA ENTERTAINMENT CENTER and BURTON GORELICK, | ) | Interlocutory Appeal From the Hamilton Circuit Court |
| Appellants (Defendants Below), | ) | No. 4-1283 A 415 |
| v | ) | (Filed February 2, 1984) |
| STEPHEN GOLDSMITH, PROSECUTING ATTORNEY FOR NINETEENTH JUDICIAL CIRCUIT, | ) | The Honorable Judith S. Proffitt, Judge |
| Appellee (Plaintiff Below), | ) | |

ORDER UPON INTERLOCUTORY APPEAL

Comes now 4447 Corporation, World Video Systems, Issi Theatre Corporation, Plaza Entertainment Center and Burton Gorelick, appellants, by counsel, John H. Weston, and Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit, appellee, by counsel, Richard E. Hendrickson, Deputy Attorney General, and appellants' Motion for Stay (Modification) of Interlocutory Injunction Without Bond Pending Appeal is submitted to the Court, Fourth District. Oral argument is had and the Court being duly advised now grants appellants' Motion for Stay, Conover, J., dissenting.

It is therefore Ordered, Adjudged and Decreed by the Court that the Order heretofore entered by the Circuit

Court of Marion County, The Honorable Anthony J. Metz, Judge Pro Tem presiding, in Cause No. C83-1788, dated August 1, 1983, is hereby modified pending appeal in the following respects:

A. That the Indianapolis Police Department shall forthwith unlock, unseal and release all property within the commercial building at 4266 [erroneously designated 4276] West 38th Street, Marion County, Indiana, which property had heretofore been locked, sealed and secured pursuant to the Order of the Marion County Circuit Court, filed August 1, 1983; and

B. Defendants shall preserve all property at 4266 West 38th Street, Marion County, Indiana, until further order of this Court; defendants shall not transfer or remove from said building any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of this Court. This paragraph shall not prevent defendants at 4266 West 38th Street, Marion County, Indiana, from transferring or selling books, magazines, newspapers or videotapes. However, until further order of this Court, all other property shall be held by the defendants.

DATED: February 2, 1984

/s/ Paul H. Buchanan
CHIEF JUDGE
Court of Appeals of Indiana

STATE OF INDIANA V.
RONALD W. SAPPENFIELD, *et al.*

RELEVANT DOCKET ENTRIES

| Date of Filing | |
|---|---|
| 4/8/85 | State of Indiana files informations charging defendants, and each of them, in Counts I, II and III with the offense of Sale or Distribution Obscene Matter; Count IV with the offense of Corrupt Business Influence; Count V, VI and VII with the offense of Sale or Distribution of Obscene Matter; Count VIII with the offense of Corrupt Business Influence together with Affidavits as to probable cause for defendants' arrests. |
| | Court finds probable cause and orders WARRANT for each of the defendants and fixes bailbond for the defendants, and each of them, in the sum of $7,500.00. Defendants, Fantasy One, Inc. and Fantasy Two, Inc., are to be served warrants by serving resident agent, Ronald W. Sappenfield. |
| 4/10/85 | Sheriff files notice that defendant, Ronald W. Sappenfield, has bonded out of jail. |
| 4/19/85 | State of Indiana appears by Rodney Shrock. Defendant, Ronald Sappenfield, appears in open court with his counsel, Joseph A. Noel. Defendant is advised of the eight counts of information against him. Defendant, Ronald Sappenfield, waives formal reading of the informations. Said defendant is read the statutes and penalties. Court now enters a plea of Not Guilty and request for jury trial. Court sets omnibus hearing for June 21, 1985 and trial by jury for 9:30 A.M., August 27th, 28th and 29th, 1985. |
| 6/4/85 | Richard Kammen of the firm of McClure, McClure, & Kammen, 235 North Delaware, In- |

dianapolis, Indiana 46204, Telephone 632-6341, file written Appearance for the defendants. Defendants file Motion to Dismiss Counts IV and VIII of the information, together with Memorandum of Law attached. Time fixed for hearing 9:30 A.M., June 21, 1985. The Court notifies counsel of hearing date by copy of this docket card.

6/14/85 State of Indiana files State's Reply Memorandum to Defendant Ronald W. Sappenfield's Motion to Dismiss.

8/23/85 State of Indiana appears by Rodney Shrock. Defendant appears by counsel. Submitted on defendant, Ronald Sappenfield's motion to dismiss. Arguments heard. Taken under advisement. State of Indiana files Motion for Discovery.

State of Indiana files response to Defendants' Motion for Discovery.

9/18/85 The Court having taken the defendants' Motion to Dismiss under advisement now grants the defendants' Motion to Dismiss as to Counts IV and VIII as per written ruling on Motion to Dismiss.

9/19/85 State of Indiana files Motion to Dismiss as to defendant Connie Sappenfield aka Connie Van Curen. Cause ordered dismissed as to said defendant, only.

11/15/85 Rodney V. Shrock counsel for State of Indiana, files Motion to Correct Errors with the court and with Honorable Dennis H. Parry. Time is fixed for hearing at 1:30 p.m., December 12, 1985. Court notifies Rodney V. Shrock and Joseph A. Noel.

Rodney V. Shrock files Statement of Facts and Grounds upon Which Errors Are Based.

Rodney V. Shrock files copy of Motion to Correct Errors and statement on the Judge.

12/18/85 The court having taken the Motion to correct errors under advisement, now overrules and denies said motion. Court notifies counsel.

12/17/85 State of Indiana files Praecipe for Record of the Proceedings.

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IN THE HOWARD SUPERIOR COURT
DIVISION I

CAUSE NUMBER 2630

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

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| STATE OF INDIANA | ) | |
| | ) | |
| VS. | ) | CAUSE |
| | ) | NUMBER 2630 |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | (Filed April 8, 1985) |
| FANTASY ONE, INC., and | ) | |
| FANTASY TWO, INC. | ) | |

INFORMATION FOR COUNT I

Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 29th day of October, 1984, in the County of Howard, State of Indiana, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy One, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco to-wit: a magazine entitled "Cum On TV" which depicts on the front cover a male/female hermaphrodite engaging in anal sex and on the back cover depicts a male/female hermaphrodite engaging in oral sex without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine taken as a whole, appeals to the prurient interest in sex and depicts in a potently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of which is contrary to the form

of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-85

/s/ Carole L. Harbaugh

NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

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IN THE HOWARD SUPERIOR COURT
DIVISION I

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| STATE OF INDIANA | ) | |
| | ) SS: | |
| COUNTY OF HOWARD | ) | |
| STATE OF INDIANA | ) | |
| | ) | |
| VS. | ) | CAUSE |
| | ) | NUMBER 2630 |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | (Filed April 8, 1985) |
| FANTASY ONE, INC., and | ) | |
| FANTASY TWO, INC. | ) | |

INFORMATION FOR COUNT II
Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 15th day of November, 1984, in the County of Howard, State of Indiana, Ronald W. Sap-

penfield, Connie Sappenfield, and Fantasy One., Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Asshole Buddies Special" which depicts on the front cover male persons engaged in anal sexual conduct by the use of a penis or finger and depicts on the back cover a male performing oral sex on the anus of another male without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine, taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

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IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

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| STATE OF INDIANA | ) | |
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| VS. | ) | CAUSE |
| | ) | NUMBER 2630 |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | (Filed April 8, 1985) |
| FANTASY ONE, INC., and | ) | |
| FANTASY TWO, INC. | ) | |

INFORMATION FOR COUNT III
Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 3rd day of December, 1984, in the County of Howard, State of Indiana, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy One, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Tight Buns" which depicts on the front cover two males engaging in anal sex and masturbation and on the back cover depicts two males masturbating without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine, taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of

which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

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IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

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| STATE OF INDIANA | ) | |
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| VS. | ) | CAUSE |
| | ) | NUMBER 2630 |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | (Filed April 8, 1985) |
| FANTASY ONE, INC., and | ) | |
| FANTASY TWO, INC. | ) | |

INFORMATION FOR COUNT IV

Corrupt Business Influence

The undersigned, being duly sworn upon oath, says:

That from on or about October 29, 1984 to on or about December 3, 1984, Ronald W. Sappenfield, Connie Sappen-

field, and Fantasy One, Inc., in Howard County, State of Indiana, did knowingly or intentionally participate in the activities of an enterprise, to-wit: Fantasyland 1, through a pattern of racketeering activity, to-wit:

A. An offense against I.C. 35-30-10.1-2, in that the defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Cum On TV", all of which occurred in Howard County, State of Indiana on October 29, 1984; and

B. An offense against I.C. 35-30-10.1-2, in that the defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Asshole Buddies Special", all of which occurred in Howard County, State of Indiana on November 15, 1984; and

C. An offense against I.C. 35-30-10.1-2, in that the defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Tight Buns", all of which occurred in Howard County, State of Indiana on December 3, 1984.

All of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-45-6-2(3).

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

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| STATE OF INDIANA | ) | |
| | ) | |
| VS. | ) | CAUSE |
| | ) | NUMBER 2630 |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | (Filed April 8, 1985) |
| FANTASY ONE, INC., and | ) | |
| FANTASY TWO, INC. | ) | |

INFORMATION FOR COUNT V
Sale or Distribution of Obscene Matter
(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 29th day of October, 1984, in the County of Howard, State of Indiana, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy Two, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Stud Alley" which depicts on the front cover two males performing oral sex and depicts on the back cover two males performing oral sex without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, political or scientific value, all of which is contrary

to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

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IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

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| STATE OF INDIANA | ) | |
| | ) | |
| VS. | ) | CAUSE |
| | ) | NUMBER 2630 |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | (Filed April 8, 1985) |
| FANTASY ONE, INC., and | ) | |
| FANTASY TWO, INC. | ) | |

INFORMATION FOR COUNT VI
Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 15th day of November, 1984, in the County of Howard, State of Indiana, Ronald W. Sap-

penfield, Connie Sappenfield, and Fantasy Two, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Four Play Guys" which depicts on the front cover male persons engaged in oral sex and depicts on the back cover males engaged in oral and anal sex without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine, taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock
Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

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IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

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| STATE OF INDIANA | ) | |
| | ) | |
| VS. | ) | CAUSE |
| | ) | NUMBER 2630 |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | (Filed April 8, 1985) |
| FANTASY ONE, INC., and | ) | |
| FANTASY TWO, INC. | ) | |

INFORMATION FOR COUNT VII
Sale or Distribution of Obscene Matter

(Class A Misdemeanor)

The undersigned, being duly sworn upon oath, says:

That on or about the 3rd day of December, 1984, in the County of Howard, State of Indiana, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy Two, Inc., did unlawfully, knowingly or intentionally sell or distribute obscene matter to Gordon Tocco, to-wit: a magazine entitled "Encounter" which depicts on the front cover two males engaging in mouth to anus sexual contact and on the back cover depicts two males engaging in anal sex without any restrictions that the average person, applying contemporary community standards, would find the dominant theme of the magazine, taken as a whole, appeals to the prurient interest in sex and depicts in a patently offensive way sexual conduct and further the magazine taken as a whole lacks serious literary, artistic, political or scientific value, all of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-49-3-1.

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbaugh
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

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IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

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| STATE OF INDIANA | ) | |
| | ) | |
| VS. | ) | CAUSE |
| | ) | NUMBER 2630 |
| RONALD W. SAPPENFIELD, | ) | |
| CONNIE SAPPENFIELD, | ) | (Filed April 8, 1985) |
| FANTASY ONE, INC., and | ) | |
| FANTASY TWO, INC. | ) | |

INFORMATION FOR COUNT VIII

Corrupt Business Influence

The undersigned, being duly sworn upon oath, says:

That from on or about October 29, 1984 to on or about December 3, 1984, Ronald W. Sappenfield, Connie Sappenfield, and Fantasy Two, Inc., in Howard County, State of Indiana, did knowingly or intentionally participate in the activities of an enterprise, to-wit: Fantasyland II, through a pattern of racketeering activity, to-wit:

A. An offense against I.C. 35-30-10.1-2, in that the Defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the

magazine "Stud Alley" all of which occurred in Howard County, State of Indiana on October 29, 1984; and

B. An offense against I.C. 35-30-10.1-2, in that the Defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Four Play Guys" all of which occurred in Howard County, State of Indiana on November 15, 1984; and

C. An offense against I.C. 35-30-10.1-2, in that the Defendants did knowingly or intentionally offer to distribute or sell to Gordon Tocco obscene matter, to-wit: the magazine "Encounter" all of which occurred in Howard County, State of Indiana on December 3, 1984.

All of which is contrary to the form of the Statute in such case made and provided, to-wit: I.C. 35-45-6-2(3).

/s/ Rodney V. Shrock

Subscribed and sworn to before me this 3rd day of April, 1985.

My Commission Expires:
2-1-87

/s/ Carole L. Harbough
NOTARY PUBLIC

Approved by me, /s/ Charles J. Myers
Prosecuting Attorney,
62nd Judicial Circuit

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA )
) ss:
COUNTY OF HOWARD )

CAUSE NO. 2630

(Title omitted in printing)

(Filed June 4, 1985)

MOTION TO DISMISS

Comes now the defendant, by counsel, and moves the court to dismiss Counts IV and VIII of the information herein for each of the following reasons:

1. The statute upon which the information is based is unconstitutional, as applied in this case, in that said statute, as applied, violates the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

2. The statute upon which the information is based is unconstitutional, as applied in this case, in that said statute, as applied, violates Article I, Sections 3, 4, 9, 12, 13, 14, 16, 17, 21, 23, and 31 of the Constitution of the State of Indiana.

3. The information herein is unlawfully vague.

4. The information herein does not state an offense with sufficient certainty.

5. The facts, as stated in the information herein, do not constitute a public offense.

6. The information herein is duplicitous.

7. There exists a jurisdictional impediment to the conviction of the defendant for the offense charged, to-wit: the defendant has not previously been convicted of any violations of I.C. 35-30-10.1-1, *et seq.*

8. There exists a jurisdictional impediment to the continuation of the charges against the defendant, to-wit: the defendant has never been accorded, pursuant to statute, either notice of, and an opportunity, for the Court to determine whether or not materials obtained by the State of Indiana are probably obscene, as defined and required by I.C. 35-30-10.1-1 *et seq.*

9. The law, as applied, is unconstitutional, in that the defendant was never accorded an opportunity for a prompt hearing on probable obscenity either prior to, or subsequent to, the seizure of the materials, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Respectfully submitted,

/s/ Richard Kammen
McCLURE, McCLURE & KAMMEN
235 North Delaware
Indianapolis, Indiana 46204
Telephone: (317) 632-6341
Counsel for Defendant

## MEMORANDUM OF LAW

Specifications 1, 2, and 8 of the Defendant's Motion to Dismiss are based upon the failure of the State of Indiana, in both the drafting of the criminal statute under

which the defendant stands charged and the application of this statute, to follow the requirements of the First Amendment to the Constitution of the United States of America, and Article I, Sections 3, 4, 9, 12, 13, 14, 16, 17, 21, 23, and 31 of the Constitution of the State of Indiana.

Several things are clear. All printed matter, all movies, and all publications of any sort are clothed with the presumption that they are legitimate and protected by the First Amendment to the Constitution of the United States of America. *Doran v. Salem Inn*, 422 U.S. 922; *Samel Inn, Inc. v. Frank*, 522 F.2d 1045; *Southeastern Promotions Limited v. Conrad*, 420 U.S. 546 (1975); *Lee Art Theatre v. Virginia*, 392 U.S. 636; *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676; *Jacobellis v. Ohio*, 378 U.S. 184; *Joseph Burstein, Inc. v. Wilson*, 343 U.S. 495; *Roaden v. Kentucky*, 413 U.S. 57; *Bantum Books v. Sullivan*, 372 U.S. 58; *Quantity of Books v. Kansas*, 378 U.S. 205. Even if an individual is arrested and charged with distribution of obscene matter, the matter is still cloaked with the presumption that it is protected, and remains so cloaked unless and until the individual charged is in fact convicted. *Heller v. New York*, 413 U.S. 483. See also *United States v. Thirty-seven Photographs*, 402 U.S. 363; *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Freedman*, the United States Supreme Court said:

> "Because only a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 402 U.S. at 367. See also *Bount v. Rizzi*, 400 U.S. 410, *Tittel Firm Corp. v. Kusek*, 390 U.S. 139.

A judgment that material is in fact obscene does not taint similar items. A judgment that material is obscene taints only that particular item. Quantity of *Books v. Kansas*, 378 U.S. 205; *Bantum Books v. Sullivan*, 83 S.Ct. 639; *Organization for a Better Austin v. Keefe*, 402 U.S. 415; *Carol v. President and Commissioner of Princess Anne County*, 393 U.S. 175.

Similarly, businesses which are convicted of selling obscene material may not be closed, nor may a permit or license be revoked or denied. *Universal Amusement Company v. Vance*, 100 S.Ct. 1156 (1980), 587 F.2d 159; *People ex rel. Busch v. Projection Room Theatre*, 550 P.2d 600 (1976); *General Corp. v. Sweeten*, 320 South 2d 668 (Alabama, 1975); *Kansas v. Motion Picture Entitled "The Bet"*, 219 Kansas 63 (1976); *Gulf States Theatres of Louisiana v. Richardson*, 287 S.2d 480 (Louisiana, 1974); *New Riviera Arts Theatre v. Davis*, 219 Tennessee 652 (1967); *Society to Oppose Pornography, Inc. v. Thevis*, 255 S.2d 876; *Giarrusso v. D'Iberville Gallery*, 295 S.2d 891; *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind. App. 1973); *Sanders v. State*, 203 S.E.2d 152 (1974); *State ex rel. Field v. Hess*, 540 P2d; *Commonwealth ex rel. Davis v. Van Emberg*, 347 Atl. 2d 712; *City of Minot v. Central Avenue News, Inc.*, 308 N.W.2d 851; *Parish of Jefferson v. Bayou Landing Limited, Inc.*, 305 S.2d 158 (1977); *Nihiser v. Sendak*, 405 F.Supp. 1124; *Yuclan Enterprises, Inc. v. Arre*, 488 F.Supp. 820; *Avon Forty-Second St. Corp. v. Meyerson*, 352 F.Supp. 994; *Oregon Book Mark Corp. v. Shrunk*, 321 F.Supp. 639; *City of Seattle v. Bitner*, 505 P.2d 126.

Finally, because of its paramount place in the constellation of constitutionally protected freedoms, statutes

which touch upon the exercise of First Amendment rights are carefully scrutinized, and if, on examination, they hinder the exercise of First Amendment rights, they are unconstitutional, both under Federal and State Constitutions, *State v. Kubel*, 172 N.E.2d 45.

*State v. Kubel, supra.*, provides an interesting analysis. In that case, the Indiana Supreme Court said:

> "Article I, Section 9, of the Constitution of Indiana provides 'no law shall be passed restraining the right to speak, write, or print freely on any subject whatso ever; but for the abuse of that right every person shall be responsible.'
>
> The State may, in the proper exercise of the police power, prevent the sale and distribution of obscene matter, but when this is attempted in a manner which tends to restrict the right of free speech or expression, then the right of free speech guaranteed by Article I, Section 9, must be weighed in the balance against the requirement of the public safety and welfare which are asserted by the restriction sought.
>
> When this test is applied to the situation with which we are now confronted, the scales weigh in favor of the right to free speech and free expression.
>
> The imposition of a strict liability by the statute here has the effect of restricting the free interchange of thought and opinion by requiring a bookseller to act at his peril in the sale and distribution of books and periodicals, whether obscene or not obscene. Under such circumstances, the bookseller will restrict and limit the books and periodicals entirely free of any possibility of contaminating matter, which might cause his summary arrest merely for having such items in his store. This type of censorship would result in preventing the sale and distribution of many books and periodicals which a court might finally determine not

> to be obscene, thereby imposing a censorship exceeding the boundaries which are prescribed by the limits beyond which the police power cannot operate."

When analyzed under the foregoing principles, it is very obvious that, as applied to businesses selling materials protected by the First Amendment, the corrupt business practices act is unconstitutional and violative of the First Amendment of the Constitution of the United States, and Article I, Section 9 of the Constitution of the State of Indiana in several different respects.

It is clear that, absent a conviction for distribution of obscene matter, the statute in question is patently unconstitutional.

Moreover, the statute is unconstitutional when applied to First Amendment related businesses, because it provides none of the required protections guaranteed by the First Amendment to the Constitution of the United States of America.

Because printed and pictorial matter is protected, one who sells such matter has the freedom to probe the outer limits of that which the community will tolerate. *Heller v. New York, supra, Memoirs v. Massachusetts,* 383 U.S. 413 (1966); *Jenkins v. Georgia,* 418 U.S. 153 (1974). The First Amendment allows the individual to challenge the thinking and the feelings of the community. *Memoirs v. Massachusetts, supra.*

Consequently, before an individual may be brought to trial as a result of an allegation that material which he has sold violates the First Amendment, he must be accorded an opportunity to show the judge that the material

is within the ambit of the First Amendment. This is required by statute. I.C. 35-30-10.1-1, *et seq.* See also *Heller v. New York, supra; Quanity of Books v. Kansas, supra; Marcus v. Search Warrant, supra.* Because petitioner has never been accorded such an opportunity, and could not be accorded such an opportunity under this particular statute, the statute, as applied and as written, is unconstitutional as applied to a First Amendment business.

Additionally, because the defendant has not been convicted of distribution of obscene matter, he submits that he cannot be constitutionally charged with racketeering. To allow this prosecution to continue will have a substantial "chilling effect" upon the exercise of First Amendment rights. Perhaps, necessarily, the statute defining obscenity is couched in vague terms. Individual standards may vary from area to area. I.C. 35-30-10.1-1, *et seq.* However, if one, who on two occasions four or five years apart, sells a particular book or material, or two similar books or materials which, in the eyes of some prosecutors, can subject him a charge of corrupt business influence, then clearly acceptable. The net result will be to reduce that which is available to adults to material only suitable for children. (Prohibited by *Butler v. Michigan,* 352 U.S. 380 (1957). The result will be a substantially "chilling effect" upon the exercise of constitutional liberties throughout the State of Indiana.

Under the Kubel doctrine, such an effect clearly would render the statute unconstitutional.

Specifications 3, 4, and 5 are based upon the failure of the statute to specifically inform the defendant of what he is charged.

Among the omissions of the pleading are specific mention of the works which the defendant allegedly sold, which the State believes to violate I.C. 35-30-10.1-1, *et seq.*

For an Information to state a public offense, the offense must be specifically charged in direct and unmistakable terms. If there is any reasonable doubt as to what offense, or if an offense is charged, that doubt must be resolved in favor of the defendant. *Belcher v. State,* 319 N.E.2d 658 (1974). Nothing may be charged by implication. *Hewett v. State,* 177 Ind. 1908; *Carter v. State,* 301 N.E.2d 524 (1973).

Further, the defendant must be informed specifically of the crime charge so that he may prepare a defense. *Loveless v. State,* 166 N.E.2d 864. In *Bruce v. State,* 104 N.E.2d 129, the Indiana Supreme Court said:

> "Where an indictment or affidavit is uncertain or ambiguous, or where its language admits of more than one construction, all reasonable doubts are to be resolved in favor of the accused and it will be construed most strongly against the State. *McNamara v. State* (1932), 203 Ind. 596, 181 N.E.2d 512; *Hunt v. State* (1927), 199 Ind. 550, 159 N.E. 149; *Littell v. State* (1893), 133 Ind. 577, 33 N.E.2d 417."

The principles set forth above are of constitutionally significant proportions. *Smith v. United States,* 360 U.S. 1. Of particultr significance, and particularly instructive, is the case of *Russell v. United States* (1962), 82 S.Ct. 1038. In *Russell,* the United States Supreme Court was faced with a defense claim that the charging papers were constitutionally insufficient and violated the defendant's rights as guaranteed by the Sixth Amendment to the Constitution of the United States of America. The court stated:

> "Where an indictment or affidavit or affidavit is uncertain or ambiguous, or where its language admits of more than one construction, all reasonable doubts are to be resolved in favor of the accused and it will be construed most strongly against the State. *McNamara v. State* (1932), 203 Ind. 596, 181 N.E.2d 512; *Hunt v. State* (1927), 199 Ind. 550, 159 N.E. 149; *Littell v. State* (1893), 133 Ind. 577, 33 N.E.2d 417."

The principles set forth above are of constitutionally significant proportions. *Smith v. United States,* 360 U.S. 1. Of particular significance, and particularly instructive, is the case of *Russell v. United States* (1962), 82 S.Ct. 1038. In *Russell,* the United States Supreme Court was faced with a defense claim that the charging papers were constitutionally insufficient and violated the defendant's rights as guaranteed by the Sixth Amendment to the Constitution of the United States of America. The court said:

> "In a number of cases, the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first whether the indictment, 'contains the elements of the offense intended to be charged, *and sufficiently appraises the defendant of what he must be prepared to meet,*' and secondly, 'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States,* 157 U.S. 286; *Rosen v. United States,* 161 U.S. 29; *Hagner v. United States,* 285 U.S. 427; *Potter v. United States,* 155 U.S. 438; *Bartell v. United States,* 227 U.S. 427; *Berger v. United States,* 395 U.S. 78; *United States v. Debrow,* 346 U.S. 374."

The Court went on to say:

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms it is not sufficient that the indictment shall charge the offense in the same generic terms as that definition; but it must state the species and must ascent to particulars.' *United States v. Cruikshank*, 92 U.S. 542. An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation against him is defective although it may follow the language of the statute. *United States v. Simmons*, 96 U.S. 360. 'In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense to be punished.' *United States v. Carll*, 105 U.S. 611."

The Court, in *Russell*, stated that there is yet a third reason for the requirement of specificity. The Court said:

> "It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set out 'the specific offense coming under the general description' with which the defendant is charged.' This purpose, as defined in *United States v. Cruikshank*, 92 U.S. 542, is 'to inform the Court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had.'"

The acts and intent that make up the crime must be set forth in the indictment and information with reasonable particularity of time, place, and circumstances. *United States v. Cruikshank, supra; Flying Eagle Publications, Inc. v. United States* (1960), 273 F.2d 799.

There are several reasons why specificity is required in criminal pleadings. These reasons are the requirement that the defendant knows specifically what the State claims he did. Additionally, it is required that the State be committed to a single theory of prosecution. As a corollary to the second reason, specificity is required that the State be committed to a single theory of prosecution. As a corollary to the second reason, specificity is required so that the Defendant may properly interpose the defense of double jeopardy to a subsequent charge.

It has been held that an information is too vague if the State could "change theories in midstream". Under the information here, the State clearly could change theories. For example, the State could claim that the predicate offenses were committed on August 16 and 17, 1982, and that the matter involved were "Debbie Does Dallas" and "Deep Throat." However, the State could change its theory at a subsequent time and claim that the predicate offenses were committed on August 19 and 20, 1982, and the works claimed to be obscene are "Playboy" and "Penthouse". Neither the defendant nor the Court has any way of knowing at this time the State's theory, and consequently, the State is not locked into such a theory. Similarly, the defendant could not, at a subsequent point, interpose double jeopardy. Because the defendant is charged with owning an adult bookstore, we may presume that he sold several different works each day encompassed by the time frame set out by the State. There would be locked in to a particular work, and consequently repeatedly charge the defendant under the same information, and the defendant would have no way of interposing his defense of double jeopardy. Thus, the information violates the Fifth

and Fourteenth Amendments to the Constitution of the United States of America.

Because the Information does not comply with the requirement of the statute, it is, of course, unlawfully vague.

The defendant has alleged in his Motion to Dismiss that the statute upon which the Information is based, that is I.C. 35-46-6-2, is unconstitutional, both on its face and as applied. In order to analyze this claim, the defendant would respectfully restate several fundamental propositions: a criminal statute is void for vagueness under the due process clause of the Fourteenth Amendment to the Constitution of the United States, if it fails to contain "ascertainable standards of guilt." *Winters v. New York* (1948), 333 U.S. 507; *State v. Kubel*, 172 N.E.2d 45; (Indiana citation).

The proper standard for determining if a criminal statute is vague is found in *Conolly v. General Construction Company* (1926), 269 U.S. 385, and *Grayned v. Rockford* (1972), 408 U.S. 104. In *Conolly v. General Construction Company, supra*, the United States Supreme Court said:

> "The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the solid rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The standard was further examined in *Grayned v. Rockford*, wherein it was explained:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the intendent dangers of arbitrary and discriminatory application.

I.C. 35-45-6-2 must be reviewed against this constitutional background. This statute provides:

(a) A person:

> (1) who has knowingly or intentionally received any proceeds *directly or indirectly derived* from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
>
> (3) who is employed by or associated with an enterprise, and who knowingly or intentionally

> conducts or otherwise *participates in the activities of that enterprise* through a pattern of racketeering activity;
>
> commits corrupt business influence, a Class C Felony.

Racketeering activity, as defined by I.C. 35-45-6-1, includes, among other things, violations of any of the securities laws, violations of certain prohibitions against sale of obscene materials, promoting prostitution, promoting professional gambling, drug offenses, and the like.

The complexity of I.C. 35-46-6-2 is readily apparent. When the individual components of this statute are analyzed, its unconstitutionality as a whole is readily apparent.

Where there is ambiguity in a criminal statute, all doubts are resolved in favor of the defendant. *U.S. v. Bass* (1971), 404 U.S. 336.

Of primary import is the question of the required scienter. The statute appears to prohibit the doing or intentional receipt of proceeds, either directly or indirectly derived from a pattern of racketeering activity. The statute does not require, however, that the individual receiving those proceeds be "a member" of the racketeering organization. Thus, one who sells eggs to a restaurant known to be controlled by a racketeering activity, might render himself liable under this statute. This is especially so if, having saved the profits from the egg business, he buys a home or continues to operate his completely legal sole proprietorship. Similarly, one rendering unquestionably permissible services to a business accused of racketeering might find himself caught up under this statute.

Because men of ordinary intelligence could not see, at the time they do certain acts, that they might be violating the law, the statute is unconstitutional. Similarly, the clerk at a liquor store, who happens to unknowingly deliver to a state legislator a bribe, is employed or associated with an enterprise and does knowingly or intentionally participate in the activities of that enterprise through a patter of racketeering activity, even though he may have been unaware of what he was doing.

Clearly, as written, the scienter element under I.C. 35-45-6-2, is not limited to activity undertaken to facilitate illegal activities of a racketeering enterprise. This is important. A racketeering enterprise may engage in many activities, some of which are not, in and of themselves, illegal.

Therefore, the defendant submits that the statute fails to specify, with reasonable clarity, specifically what kinds of activity it prohibits and is therefore unconstitutionally vague. It is, of course, fundamental that no one may be required, at peril of life, liberty or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. *Lanzetta v. New Jersey* (1939), 306 U.S. 451.

The defendant has previously alluded to a second problem, which is that there is no requirement that an individual know that his actions are a patter of racketeering activity. As indicated, a seller, one who is a vendor to an enterprise which happens to be participating in racketeering activities, may be obtaining proceeds indirectly from said activities, and may find himself within the ambet of this statute.

The vague language of the statute thus may subject an individual to criminal sanctions for activities, the legality of which cannot be determined solely by the actor's conduct, but must be determined by factors which a person may be unaware of at the time. Such a statute violates due process. It lacks the ascertainable standards that give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *U.S. v. Harris* (1954), 347 U.S. 612. A second example is perhaps appropriate. As discussed elsewhere in this memorandum, I.C. 23-2-1, *et seq.*, provides several hundred different acts, the doing of which or the failure to do, might constitute a criminal violation.

One who is a secretary for a business which is systematically violating the technical aspects of I.C. 23-2-1, is deriving, indirectly, proceeds from a patter of racketeering activity. Should that individual choose to purchase a home, or perhaps rent an apartment (a lease is an interest in real property), might find themselves subjected to prosecution under this statute. Yet, until their arrest, their conduct would have been so innocent that they would have had no way of knowing, in any manner, that they were violating the law.

Unlike traditional forms of conspiracy, which require active participation, the racketeering statute provides mere employment or "association." Additionally, the statute fails in any manner to distinguish between the principles in the racketeering business and mere employees or associates. As such, the statute is unconstitutionally vague.

Finally, the term "association" does not lend itself to a sufficiently precise definition to be a permissible standard of criminal liability.

Friends are often associates. Clearly a secretary is associated with a business. Clearly a vendor may be associated with a business. All of those may have knowingly received proceeds directly or indirectly derived from a pattern of racketeering activity. Yet, their conduct may have been completely innocent.

Finally, the term "pattern of racketeering activity" is unconstitutionally vague. The statute defines "pattern of racketeering activity" as:

> "at least two incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents. However, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five years after a prior incident of racketeering activity.

When analyzed, it is obvious that this definition is not constitutionally acceptable. For example, does the phrase "two incidents of racketeering activity that have the same or similar intent" mean traditional criminal scienter, such as knowing or wilful, or the intent to accomplish a certain goal, *e.g.*, make money. The same problem exists with the phrase "result, accomplice, victim, or method of commission." What is a similar result? What is a similar accomplice? What is a similar victim?

One who sells a copy of "Hustler" on September 1, 1980, and who, on September 1, 1984, sells a second copy of "Hustler" may have been deemed to have violated I.C. 35-30-10.1-2 (Distribution of Obscene Matter). Those incidents, while seemingly isolated, are no so isolated as to be

outside the prohibition of the racketeering activity. While four years might seem to be isolated apparently in Indiana this is not the case. They would probably have the same or similar intent; i.e., to sell the magazine; the same or similar result, i.e., to derive proceeds from that sale; and the same or similar method of commission, i.e., handing the magazine across a counter to a customer and taking his money. Yet, the clerk who sold these two issues of "Hustler" would in no manner have any reason to think that he was elevated to the status of a senior member of a racketeering organization.

Additionally, because the statue purports to allow the trial of several allegations for which the Statute of Limitations may have passed, which are undefined, and for which one might not have notice that they were of sufficient seriousness as to be a Class C Felony, the statute denies due process and is unlawfully vague.

Respectfully submitted,

/s/ Richard Kammen

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Counsel for Defendant

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(Certificate of Service omitted in printing.)

IN THE HOWARD SUPERIOR COURT
DIVISION I

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

CAUSE NO. 2630

(Title omitted in printing.)

STATE'S REPLY MEMORANDUM TO
DEFENDANT RONALD W. SAPPENFIELD'S
MOTION TO DISMISS

The Indiana statute pertaining to criminal prosecutions for Racketeer Influenced and Corrupt Organizations (RICO) is I.C. 35-45-6-1 *et seq.* This criminal RICO statute is patterned after the Florida statute, Fla. Stat. Ann. § 895-01 (West Supp. 1982). Both the Indiana and Florida statutes are modeled upon the Federal Statute which is found at 18 U.S.C. § 1961 *et seq.* Very little Indiana case law exists on criminal RICO prosecutions, but the Florida and Federal case law are often on point.

Defendant Ronald W. Sappenfield has filed a Motion to Dismiss raising a number of constitutional and jurisdictional grounds. These will generally be considered in the same order they appear in his Motion. Attention will be given to whether any of these grounds are relevant to either the RICO statute, itself, or to I.C. 35-30-10.1-1 *et seq.* which governs to the sale or distribution of obscene materials, and which statute is a specified offense upon which a "pattern of racketeering activity" can be established.

I

*Do either of these statutes violate the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America?* No, they do not. The First Amendment pertains to freedom of speech and freedom of worship. Nothing in the criminal RICO statute deals with either of these liberties; therefore, if any objection under the First Amendment is to be made, it must arise under the obscenity statute. Indiana case law applies. The Indiana obscenity statute, I.C. 35-30-10.1-1 *et seq.*, has been upheld in *Ford v. State* (1979), — Ind.App. —, 394 N.E.2d 250 against First Amendment challenge.

*Do either of the statutes violate the Fifth Amendment?* No, they do not. The Federal RICO statute upon which Indiana's is based was upheld against both a Fifth and Eighth Amendment challenge in *U.S. v. Grande* (4th Cir.1980) 620 F.2d 1026; *Cert denied sub.nom. Berg v. U.S.* (1980), 449 U.S. 919. The obscenity statute was upheld against Fifth Amendment attack in *Riley v. State* (1979), 389 N.E.2d 367 and *Ford v. State, supra.*

*Do either statutes violate the Sixth Amendment?* No, they do not. Neither of these statutes deny any procedural or substantive right guaranteed to the accused by the Sixth Amendment. Since neither of these statutes pertain to "suspect classes" of individuals, it is difficult to justify any violation of the Fourteenth Amendment.

II

*Do either of these statutes violate Article I, of the Constitution of the State of Indiana?* No, they do not. Defendant has cited a large number of sections contained in Article I of the Indiana Constitution, none of which per-

tain, in any way, to the validity of a Criminal RICO prosecution, in a general way. It appears that the only possible application of Article I to this case, in any way whatsoever, could only arise under Section 9, Article I, which provides as follows:

> Section 9: Free speech and writing. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, or any subject whatsoever: but for the abuse of that right, every person shall be responsible.

If the obscenity statute is not unconstitutional under the First Amendment of the U.S. Constitution, it is not unconstitutional under Article 1, Section 9 of the Indiana Constitution.

III

*Is the criminal information herein unlawfully vague, or does it fail to state an offense with sufficient certainity?* The answer to both questions is "No". The criminal informations are specific, not only as to the specific manners in which the Defendant engaged in conduct prescribed by the RICO statute, but also as to the specific acts of Defendant constituting the "pattern of racketeering activity". The Defendant is not correct in his general allegation that the facts contained in the charges fail to state a public offense.

IV

*Are the informations daplicitous, or are the charges multiplicitas?* Each information filed requires entirely different elements to be proven for conviction. Defendant's contention is spurious.

V

The Defendant's belief that a prior conviction for violation of I.C. 35-30-10.1-1 *et seq.* is a jurisdictional requirement for prosecution under the RICO statute is misplaced. I.C. 35-45-6-1(d) speaks for violations of any one of several listed statutes; there is no statutory requirement for convictions under the listed statutes.

VI

The Defendant feels that he should be afforded a preliminary determination of obscenity, apparently similar to the procedure outlined in I.C. 35-30-10.1-6, as a constitutional and jurisdictional requirement prior to prosecution. His argument is not well-taken.

I.C. 35-30-10.1-6 provides a preliminary procedure for determination of probable obscenity prior to arrest for violation of the obscenity statute. This section is triggered by the State if the questioned material is seized by the State, but by request of the Defendant if the material was obtained by purchase. In this instance, the material was acquired by purchase, and the Defendant has failed to request any such preliminary hearing, this waiving any right to it. (For a similar example involving a local ordinance containing such a preliminary hearing mechanism, *see*: *Massey v. City of Mishawaka* (19—), 378 N.E.2d 14.

The Defendant's reliance on these grounds is also misplaced for the simple reason that this case is *not* a prosecution under I.C. 35-30-10.1-1 *et seq.*, and Defendant was not arrested under that statute for these charges. This is a RICO prosecution. The most important constitutional difference is simply that this prosecution does not involve

prior restraint, which is the heart and soul of the First Amendment considerations for which the preliminary hearing is required, if seizure occu under the obscenity statute.

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CONCLUSION

The Defendant's Motion to Dismiss has no merit and should be denied.

Respectfully submitted,

/s/ Rodney V. Shrock,
RODNEY V. SHROCK,

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(Certificate of Service omitted in printing.)

IN THE HOWARD SUPERIOR COURT
1985 TERM

STATE OF INDIANA )
) SS:
COUNTY OF HOWARD )

STATE OF INDIANA

vs.

RONALD W. SAPPENFIELD, CONNIE SAPPENFIELD, FANTASY ONE, INC. AND FANTASY TWO, INC.
CRIMINAL CAUSE NO 2630

(Filed September 18, 1985)

RULING ON MOTION TO DISMISS

The defendants are charged in Counts IV & VIII with violation of Indiana Code 35-45-6-2(3). It reads as follows:

> "a person: (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits Corrupt Business Influence, a class C felony."

The defendants are charged with two (2) counts of Racketeering by the sale or distribution of obscene materials as defined in Indiana Code 35-30-10.1-2.

"Racketeering activity" is defined as follows:

> " . . . . to commit, to attempt to commit, or to conspire to commit a violation . . . . I.C. 35-30-10.1-2 . . . ."
>
> "Pattern of Racketeering activity means engaging in at least two (2) INCIDENTS (emphasis supplied) of racketeering activity . . . ."

The Constitution of the United States of America, by its First Amendment, offers protection to printed matters, movies and publications by the presumption that they are legitimate.

There must be a judicial determination, in an adversary proceeding, that these items are outside the scope of protection before a valid restraint may be imposed upon this fundamental right.

The defendant argues various points in support of their motion to dismiss and requests of this court a close scrutiny of this statute because of the possible "chilling effect" upon First Amendment rights.

The defendants in this cause have not been convicted of sale or distribution of obscene material. In fact, they have been charged with such an offense simultaneously herewith. The material alleged to have been sold or distributed has yet to be determined to be prohibited or protected. No trial has taken place for a jury to determine the "prevailing community standard".

The Racketeer Influence and Corrupt Organization Statute (R.I.C.O.) allows for the prosecutor to determine that the material violates current standards of the community and that merely purchasing on two (2) occasions fulfills the statutory requirement of "two incidents" of activity.

What constitutes "two incidents of *activity*"? Certainly it must be more than merely distributing or selling written material which has not been determined by a judicial proceeding to be unlawful.

In *Conolly v. General Construction Co.* (1926), 269 U.S. 385, it is stated

"The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the solid rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Therefore, this Court finds the defendants' argument is well founded and this Court now finds that Indiana Code 35-45-6-2(3), as it applies to a violation of Indiana Code 35-30.10.51-2, is unconstitutionally vague and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, and therefore grants the defendants' Motion to Dismiss as to Counts IV and VIII.

DATED THIS 18th DAY OF SEPTEMBER, 1985.

/s/ Dennis H. Parry
DENNIS H. PARRY
JUDGE, HOWARD SUPERIOR COURT

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

| | | |
|---|---|---|
| STATE OF INDIANA, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| vs. | ) | |
| | ) | No. |
| RONALD W. SAPPENFIELD, | ) | 34A02-8603-CR-74 |
| CONNIE SAPPENFIELD, | ) | |
| FANTASY ONE, INC. and | ) | |
| FANTASY TWO, INC., | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

APPEAL FROM THE HOWARD
SUPERIOR COURT DIVISION I

The Honorable Dennis H. Parry, Judge

Cause No. 2630

RATLIFF, C.J.

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## STATEMENT OF THE CASE

The State of Indiana appeals the dismissal of two informations charging the Sappenfields with violation of Indiana Code section 35-45-6-2, Indiana RICO statute. We reverse.

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## FACTS

As a result of an investigation into adult bookstores in Howard County, law enforcement officers purchased

several magazines at two stores allegedly owned or operated by Ronald and Connie Sappenfield. The magazines contained graphic photographs of heterosexual and homosexual activity. The Sappenfields were charged with violating Indiana's obscenity statute, Indiana Code section 35-49-1-1 *et seq.* Several Howard County residents examined the magazines and gave verified statements to the effect that the magazines were obscene. The Sappenfields have not been tried or convicted on any of the six allegations of distributing obscene matter. The prosecuting attorney also alleged a pattern of criminal activity arising out of the distribution of the same obscene matter pursuant to the Indiana Corrupt Business Influence statute (RICO), Indiana Code section 35-45-6-2.

On June 4, 1985, the Sappenfields moved to dismiss the two counts based on Indiana's RICO statute arguing RICO was unconstitutionally vague and violative of the 14th Amendment. On September 18, 1985, the trial court found that RICO could not be constitutionally applied to violations of Indiana's obscenity statute. Thereafter, the state perfected this appeal.

———o———

## ISSUE

Whether the trial court erred in granting the Sappenfields' motion to dismiss in ruling that Indiana's RICO statute, I.C. § 35-45-6-2, as it applies to a violation of Indiana's obscenity statute, I.C. § 35-49-1-1 *et seq.*, is unconstitutionally vague and violative of the Due Process Clause of the Fourteenth Amendment.

## DISCUSSION AND DECISION

The Indiana RICO statute, as enacted by the legislature in 1980, is essentially patterned after the federal anti-racketeering laws. *See Alvers v. State* (1986), Ind. App., 489 N.E.2d 83, *trans. denied;* 18 U.S.C.A. sections 1961-1968 (West 1984). Indiana Code section 35-45-6-2(a) states:

> "A person:
>
> (1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
>
> (3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony."

"'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of any of several enumerated predicate offenses, including violation of the obscenity statute. Indiana Code section 35-45-6-1. A "pattern of racketeering activity" means "engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission . . . ." I.C. § 35-45-6-1. The purpose of the federal RICO statute, after which the Indiana statute is

patterned, is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States* (1983), 464 U.S. 16, 26, 104 S. Ct. 296, 302, 78 L. Ed. 2d 17, 26.

Recently, in a factually similar case, the Indiana Supreme Court addressed the very issue before us today:

> "Before addressing the questions certified for interlocutary appeal, we must analyze the issue found by the Court of Appeals to be dispositive, namely whether the RICO/CRRA statutory scheme as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. That analysis begins with the proposition that an act of the legislature must be afforded a presumption of constitutionality. *Ruge v. Kovach* (1984), Ind., 467 N.E.2d 673; *Johnson v. St. Vincent Hospital, Inc.* (1980), 273 Ind. 374, 404 N.E. 2d 585."

*4447 Corp. v. Goldsmith* (filed March 2, 1987), Ind. No. 29S04-8703-CV-270, slip op. at 7.

> "Both the federal and Indiana RICO statutes delineate predicate offenses which underlie an allegation of a pattern of racketeering activity. The Indiana RICO statute as originally enacted included obscenity violations as a predicate offense. While the federal RICO statute did not initially contain the predicate offense of obscenity violations, in 1984 Congress amended the statute to include as a predicate offense 'any act . . . involving . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year.' 18 U.S.C.A. § 1961(1)(A) (West Supp. 1986). The statute was further amended to include 'any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter).' 18 U.S.C.A. § 1961(1)(B) (West Supp. 1986).

> "Given the clear legislative purpose in enacting these anti-racketeering statutes, that purpose, in the context of alleged obscenity violations, cannot be specifically construed to represent an attempt to restrain the sale or distribution of expressive materials. The legislative attack on racketeering activity is not, as appellants contend, merely a semantic device intended to circumvent well-established First Amendment doctrine.
>
> "Obscenity does not come within the area of constitutionally protected speech or press. *Miller v. California* (1973), 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419; *Roth v. United States* (1957), 354 U.S. 476, 77 S. Ct. 1804, 1 L. Ed. 2d 1498. Our legislature, as has Congress, has determined that obscenity violations should be one of the underlying offenses which may constitute racketeering activity as defined in the RICO statute. We must take heed of that legislative intent.
>
> "We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications."

*4447 Corp.*, slip op. at 9-10.

> "We hold that the RICO/CRRA statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments of the United States Constitution."

*Id.* at 12. The Supreme Court went on to determine that prior convictions for the underlying offenses are not required to prove a pattern of racketeering activity under I.C. § 35-45-6-2.

In light of this recent supreme court decision, the State's position is clearly correct. Indiana's RICO statute is not unconstitutional as applied to the State's obscenity statute. Therefore, the trial court erred in granting the

Sappenfields' motion to dismiss regarding the counts based on the RICO statute.

We therefore reverse the judgment and remand for proceedings consistent with this opinion.

ROBERTSON, J. and NEAL, J., concur.

INDIANA COURT OF APPEALS'

Cause No. 34A02-8603-CR-74

STATE OF INDIANA -V- SAPPENFIELD, RONALD CONNIE

You are hereby notified that the COURT OF APPEALS has on this day 5/15/87 APPELLEE'S PETITION FOR REHEARING DENIED. GEORGE B. HOFFMAN, JR., ACTING CHIEF JUDGE.

WITNESS my name and the seal of said Court, this 15th day of MAY, 1987.

/s/ Daniel Heiser

---

Clerk Supreme Court, Court of Appeals and Tax Court

INDIANA SUPREME COURT

STATE OF INDIANA -V- SAPPENFIELD, RONALD & CONNIE

You are hereby notified that the COURT OF APPEALS has on this day 8/17/87 APPELLEE'S PETITION TO TRANSFER IS HEREBY DENIED, WITHOUT OPINION. SHEPARD, C.J., DEBRULER, J. VOTES TO GRANT.

WITNESS my name and the seal of said Court, this 17th day of AUGUST, 1987.

/s/ Daniel Heiser

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Clerk Supreme Court, Court of Appeals and Tax Court

Supreme Court, U.S.
FILED
MAY 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-614

In The
# Supreme Court of the United States
October Term, 1987

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., and
FANTASY TWO, INC.,

*Petitioners,*

v.

STATE OF INDIANA,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT**

## BRIEF FOR THE PETITIONERS

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## QUESTIONS PRESENTED FOR REVIEW

I

Is the Indiana criminal RICO statute (I.C. 35-45-6-1 *et seq.*, the Indiana Corrupt Business Influence Act) as applied to obscenity offenses unconstitutionally vague in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States?

Does the use of obscenity or an obscenity related offense, other than child pornography, as a predicate offense of the Indiana RICO statute violate the First Amendment to the Constitution of the United States?

II

Is Indiana's criminal RICO statute violative of the First and Fourteenth Amendments to the Constitution of the United States to the extent that it allows prosecution for criminal RICO on the basis of two or more allegations of obscenity violations which have not been reduced to convictions?

III

Are the first amendment procedural safeguards of *Heller v. New York*, 413 U.S. 483 (1973) violated by a state law which allows the arrest and prosecution of an individual for crimnial RICO based upon predicate allegations of obscenity violations, not reduced to conviction, without allowing, post-arrest, a prompt adversary hearing to determine the probable obscenity of items upon which the prosecution is based?

## LIST OF PARTIES

All parties appear in the caption of this case in this Court. There are no parent, subsidiary or affiliated companies of the corporate parties.

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No. 87-614

In The
# Supreme Court of the United States
October Term, 1987

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., and
FANTASY TWO, INC.,

*Petitioners,*

v.

STATE OF INDIANA,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT**

## BRIEF FOR THE PETITIONERS

### OPINION BELOW

The decision of the Indiana Court of Appeals, First District, published at 505 N.E.2d 504 (1987) appears in the Appendix hereto. (Consolidated Joint Appendix 176, hereinafter referred to as "J.A."). A timely petition for rehearing was filed and denied without opinion. (J.A. 182). A timely petition for transfer was filed with the Supreme Court of Indiana and was denied without opinion. (J.A. 183).

## JURISDICTION

The decision of the Indiana Court of Appeals was entered on March 31, 1987. A timely petition for rehearing was filed and denied on May 15, 1987. A petition for discretionary transfer was timely filed with the Indiana Supreme Court and denied on August 17, 1987. The Petition for Certiorari was filed within sixty days of that date, on October 14, 1987, as required by 28 U.S.C. § 2101(d) and Rule 20 (1) of this Court, and granted on March 7, 1988. The Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

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## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides in pertinent part: **"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."**

The Fifth Amendment to the Constitution of the United States of America provides in pertinent part: **"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."**

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that: **"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

## STATUTES INVOLVED

The pertinent sections of the Indiana Code are as follows:

### Chapter 6. Racketeer Influenced and Corrupt Organizations

#### 35-45-6-1 Definitions

Sec. 1. As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1, a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a Class C felony (IC 35-42-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-

1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); official misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). As added by Acts 1980, P.L.199, SEC.2. Amended by P.L.190-1984, SEC.1.

**35-45-6-2 Corrupt business influence**

Sec. 2. (a) A person:

(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly; an interest in or control of real property or an enterprise; or

(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony. As added by Acts 1980, P.L.199,SEC.2.

**Chapter 30.5. Civil Remedies for Racketeering Activity.**

**34-4-30.5-1 Definitions**

Sec. 1. As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) is the object of corrupt business influence (IC 35-45-6-2); or

(2) has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. As amended by P.L.308-1985, SEC.1.

**34-4-30.5-2 Injunctive relief from corrupt business influence; action by prosecuting attorney**

Sec. 2 The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) order a defendant to divest himself of any interest in any enterprise or real property;

(2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) order the dissolution or reorganization of any enterprise;

(4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon

finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. As added by Acts 1980, P.L.199, SEC.1.

**34-4-30.5-3 Action for forfeiture of property incident to corrupt business influence; orders for forfeiture and seizure**

Sec. 3. (a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have prop-

erty subject to forfeiture seized by law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a vio'ation of IC 35-45-6-2 involving the property in question has occurred. As added by Acts 1980, P.L.199, SEC.1.

**34-4-30.5-4 Seizure of property subject to forfeiture; requisites; custody; limitation of actions**

Sec. 4. (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) the seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter;

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) place the property under seal;

(2) remove the property to a place designated by the court; or

(3) require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to replevin, but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 of this chapter. If an action is not filed within 180 days after the date of seizure, the law enforcement agency whose

officer made the seizure shall return the property to its owner. As added by Acts 1980, P.L.199, SEC.1.

**34-4-30.5-5 Injunctive relief and damages from corrupt business influence; actions by aggrieved persons; jury trial, right to forfeited property; state as aggrieved person**

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of a corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) an amount equal to three (3) times his actual damages;

(2) the costs of the action;

(3) a reasonable attorney's fee; and

(4) any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. As amended by P.L.308-1985, SEC.2.

**34-4-30.5-6 Collateral estoppel; criminal proceeding**

Sec. 6. In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. As added by Acts 1980, P.L.199, SEC.1.

## ARTICLE 49 OBSCENITY AND PORNOGRAPHY

### Chapter 2. General Provisions.

**35-49-2-4 Adversary hearing; application for; preliminary determination**

Sec. 4. (a) Within ten (10) days after:

(1) matter is obtained by seizure or by purchase under this article; or

(2) the defendant is arrested under this article;

whichever is later, and before trial, the state, the defendant, an owner, or any other party in interest of any matter seized or purchased may apply for and obtain a prompt adversary hearing for the purpose described in subsection(b).

(b) At the adversary hearing, the court shall make a preliminary determination of whether the matter is:

(1) probably obscene; or

(2) probably harmful to minors;

As added by P.L.311-1983, SEC.33.

## STATEMENT OF THE CASE

Commencing in October, 1984 and thereafter until December 3, 1984, officers of the Howard County, Indiana Sheriff's Department purchased magazines at two stores owned by the corporate petitioners and allegedly controlled by Ronald and Connie Sappenfield. (R. 5-15). (Petitioners are hereinafter referred to as "petitioner" or "Sappenfield.") No notice was given to the stores that these purchases had been made or that there was a question concerning the propriety of the magazines purchased.

On April 8, 1985, charges were filed against the two Sappenfields and the two corporate defendants. The charges alleged six (6) separate violations of IC 35-49-3-1 (Sale or distribution of obscene matter,) class A misdemeanors, and two counts of corrupt business influence (RICO), class C felonies.[1]

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[1]Under Indiana law, the misdemeanors carry penalties of up to one (1) year imprisonment and a $5000 fine (IC 35-50-3-2). Class C felonies carry a presumptive term of imprisonment of five (5) years which can be increased to eight (8) years or reduced to two (2) years and fines of up to $10,000 (IC 35-50-2-6).

Pursuant to Indiana law, an ex parte probable cause submission had been made by the prosecutor. (R. 16-275). Besides the magazines, the prosecutor submitted statements of Officer Gordon Tocco reflecting the purchase of the magazines (R. 17-23), and the certificates of incorporation which reflected the Sappenfields' positions as directors and incorporators (R. 24-48). Also submitted were statements of three individuals; Jerry Fiscus (R. 49-53), Jean Porter (R. 54-57), and Linden Hill (R. 58-62). Each of these individuals described the length of his or her residence in Howard County and his or her current employment. Each rendered an opinion that the magazines appealed to the prurient interest in sex; depicted sexual conduct in a patently offensive way; and lacked serious literary, artistic, political, or social value. Ronald Sappenfield was thereafter arrested and released on bond. (R. 277, 278). Although she was initially charged, Connie Sappenfield, the former wife of Ronald W. Sappenfield, was never arrested. Charges against her were dismissed on September 19, 1985.

On June 4, 1985, petitioner moved to dismiss the RICO charges alleging that the RICO statute, as applied to obscenity offenses, violated both Federal and state constitutional law in various respects (R. 288-301, J.A. 150-167). Petitioner alleged that the RICO statute was unconstitutional in that it was unlawfully vague and overbroad, denied procedural due process in the context of obscenity, and had an impermissible chilling effect upon the exercise of first amendment rights. Sappenfield specifically alleged violations of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

On September 18, 1985, the Howard County Superior Court, Division 1, the Honorable Dennis H. Parry, Judge,

found that the RICO statute could not be constitutionally applied to violations of Indiana's obscenity statute. The court held that the Indiana RICO statute, as applied to obscenity, is unlawfully vague (R. 367, 368, J.A. 173-175). The trial court did not reach the merits of petitioners' additional reasons that RICO, as applied to obscenity, is unconstitutional.

The State appealed the trial court's decision to the Indiana Court of Appeals which reversed the trial court based upon the Indiana Supreme Court's decision in *4447 Corporation v. Goldsmith* and *Ft. Wayne Books, Inc. v. Indiana,* 504 N.E.2d 559 (Ind. 1987) (No. 87-470 in this Court).

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## SUMMARY OF THE ARGUMENT

A) The constitutionality of the RICO statute as applied to obscenity must be determined on the basis of its impact upon first amendment rights. This requires utilization of the higher standard of review used by the Court when considering the impact of a particular law upon freedom of speech. *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176 (1981); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 67 (1963).

B) The challenged statutes have a constitutionally significant chilling effect upon the exercise of first amendment rights due to their broad sweep, vagueness, and draconian sanctions. This chilling effect far outweighs any alleged justifications offered in support of the statute.

C) Obscenity cannot constitutionally be a predicate offense of RICO because of the conceptual differences between obscenity and crimes such as theft, dealing in drugs, and murder. Given the conceptual and qualitative differences, the Indiana RICO law, as presently formulated using obscenity as a predicate offense, does not have the requisite sensitivity to first amendment interests.

Merely labeling speech "racketeering" does not deprive it of its protected status, *DeJonge v. Oregon*, 299 U.S. 916 (1936), and is not adequate justification to allow the use of the unprecedented sanctions of RICO, against those who deal in communicative material.

D) The Indiana RICO statute is unconstitutionally vague and overbroad as applied to obscenity for the following reasons:

(1) The inherent vagueness of the *Miller* standard contributes to the overall vagueness and overbreadth of RICO as applied to obscenity.

(2) The concept that the manner or place of display can be a legitimate part of the obscenity decision as allowed by the Indiana Supreme Court contributes to the vagueness and overbreadth of RICO as applied to obscenity.

(3) The RICO statute, as applied to obscenity is vague and overbroad because of the enormous sweep of the statute and the fact that it makes criminal, ordinary everyday transactions in completely lawful businesses which happen to cross that "dim line

between protected and unprotected speech." This sweep has an unprecedented chilling effect.

(4) The reduced scienter requirement contemplated by the courts in obscenity prosecutions contributes significantly to the vagueness and overbreadth of RICO as applied to obscenity.

(5) The minimal concept of "participation" in a RICO "enterprise" contributes to the unconstitutional overbreadth, and resulting chilling effect of RICO as applied to obscenity.

E) If RICO can be constitutionally applied to obscenity, then the unusual nature of the *Miller* standard requires that the predicate acts be violations which have occurred in the trial court's jurisdiction and which have been properly reduced to convictions. The alleged violations must arise successively, i.e., the second act must be after the first conviction.

F) If RICO can be constitutionally applied to obscenity, the procedures utilized must contain substantial safeguards against abuse of first amendment rights. Minimally, there must be provision for a prompt, full, adversary hearing focusing upon the alleged obscenity of items constituting the alleged predicate acts. This hearing must use a standard of review which will protect against improper abuses of RICO and the resulting impact upon first amendment rights.

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## ARGUMENT

### I

### THE EFFECT OF THE RICO STATUTE, USING OBSCENITY AS A PREDICATE OFFENSE MUST BE ANALYZED IN CONSIDERATION OF THE IMPACT UPON FIRST AMENDMENT RIGHTS.

In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), this Court held that: " . . . the standard of review is determined by the nature of the right assertedly threatened or violated rather than the power being exercised . . . *Thomas v. Collins*, 323 U.S. 516, 529-530, 65 S.Ct. 315, 322, 89 L.Ed. 430 (1945)." When the right assertedly threatened is protected speech, this Court has not deviated from that concept. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172 (1986).[2] In *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987) (No. 87-470 in this Court), the Indiana Supreme Court refused to consider the first amendment impact of RICO as applied to

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[2]*Arcara* dealt with the closing of a bookstore because of illegal, non-communicative activities which took place therein. However, as Justice O'Connor noted:

"I agree that the Court of Appeals erred in applying a First Amendment standard of review where, as here, the government is regulating neither speech nor an incidental, non-expressive effect of speech. Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment. If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172, 3178 (1986) (O'Connor, J., concurring).

obscenity. Rather, the court considered only the alleged legislative justification.[3]

Petitioner requests the court to consider not only the alleged justification for applying RICO to obscenity allegations but the more practical, real impact upon first amendment rights.

The justification advanced by the State to support the application of RICO to obscenity is the need for new weapons of unprecedented scope for an assault on organized crime. *4447 Corporation, supra,* at 564, citing *Russello v. United States,* 464 U.S. 16, 26 (1983). If this justification exists as to obscenity violations, which Sappenfield disputes, it is outweighed by the more important freedom of speech guaranteed by the first amendment.

This Court has consistently held that criminal statutes prosecuting obscenity and the punishment thereof must be "carefully limited." *Miller v. California,* 413 U.S. 15, 23-24 (1973); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 682-685 (1968). The Court has held that criminal and civil sanctions must not sweep so broadly that they create a chilling effect which would curtail the availability of non-obscene literature due to self-censorship. *Smith v. California,* 361 U.S. 147 (1959); *Miller, supra.*

In *Bantam Books, Inc. v. Sullivan,* 372 U.S. at 66, this Court said:

> "... a State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without re-

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[3]Although the Indiana Supreme Court did not specifically state that it was only considering the legislative justification for applying RICO to obscenity, a review of the opinion reveals that this in fact is what occurred.

> gard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 730-731, 81 S.Ct. 1708, 1715, 1716, 6 L.Ed.2d 1127.
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> Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. People of the State of California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205; *Marcus v. Search Warrant, supra*, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.

The challenged statute has a draconian impact due to its vagueness, its broad sweep and the contemplated pre- and post-indictment seizure of assets, post-conviction forfeiture,[4] and harsh prison sentences.

A prosecutor believing a particular movie, book, or magazine to be obscene could charge RICO based upon the accusation that the movie was shown on two separate oc-

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[4]IC 34-4-30.5-6 provides that any issues determined in a criminal proceeding may not be relitigated in any civil proceedings. Therefore, a conviction and perhaps even a finding of probable cause conclusively establishes virtually all of the proof necessary to forfeit assets. Moreover, even if the prosecuting attorney refrains from seeking forfeiture, IC 34-4-30.5-5 gives standing to seek forfeiture to the attorney general and persons classed as "aggrieved persons." As a practical matter, actions for forfeiture will accompany any criminal proceeding either before or after conviction.

casions the same day. Thus, the entire "pattern" could be based upon one misjudgment by the seller of whether a particular item is lawful. Given the practical difficulties of defending RICO allegations, as well as the natural desire to avoid the risk of having to do so, it is obvious that there will be massive self-censorship by persons dealing in protected material.

Thus, petitioner asks this Court to analyze the RICO statute as applied to obscenity from the perspective of its impact upon first amendment rights.

## II

## THE USE OF OBSCENITY OFFENSES, OTHER THAN CHILD PORNOGRAPHY, AS PREDICATE OFFENSES OF RICO, UNDER THE INDIANA RICO STATUTE VIOLATES THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

RICO was created to deal with the perceived impact of "organized crime." The Indiana RICO statute was modeled after the Federal statute but uses somewhat different predicate offenses. Included in the predicate offenses is any violation of IC 35-49-1 which defines obscenity and obscenity related offenses.[5]

Much is made of so-called "organized crime's" alleged ties to the production and distribution of sexually explicit

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[5]The possible range of predicate offenses under IC 35-49-3 includes the importation into Indiana and sale or distribution within Indiana of obscene matter. Also, display or distribution of matter "harmful to minors" may be a predicate offense. Under some statutory provisions, a minor need not actually see the offensive material. IC 35-49-3-3 (2) and (3).

material. Attorney General's Commission on Pornography, *Final Report*, (July, 1986). In order to combat this perceived vice, the Indiana legislature and others have resorted to the unconstitutional tactic of suppressing speech by calling it "racketeering." Labeling speech "racketeering" or "Nazi" or "communist" does not strip it of its first amendment protection. *DeJonge v. Oregon*, 299 U.S. 353 (1936); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied* 439 U.S. 916 (1978).

If, indeed, crimes other than obscenity are being committed in the production and distribution of erotic material, there are numerous criminal statutes, including RICO, which can be employed by state and local authorities to stop that conduct. *See, e.g., United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982).[6]

The justification advanced for including obscenity as a predicate offense of RICO is the elimination of businesses that have engaged in some unlawful speech in the past. Attorney General's Commission on Pornography, *Final Report*, (July, 1986) at 435, 498. Indeed, the primary goal of RICO is the elimination of certain enterprises. *Russello v. United States*, 464 U.S. 28 (1983). While this goal may be laudable in other circumstances, as applied to businesses

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[6]*Thevis* involved the RICO prosecution of the owner of a group of corporations whose purpose was the distribution of adult books and films. The predicate offenses were murder and arson. Other non-speech predicate offenses in Indiana may include tax violations, securities fraud, and theft, to name a few.

Under Federal law, prohibitions against kidnapping, 18 U.S.C. § 1201, the "Mann" act, 18 U.S.C. § 2421 *et seq.*, tax violations and child pornography, 18 U.S.C. § 2251, are among the panoply of Federal offenses which provide adequate protection against non-speech criminal behavior.

whose sole function is communicative it threatens the very core of first amendment protections.

Other than offenses involving child pornography, *New York v. Ferber*, 458 U.S. 747 (1982), obscenity offenses are conceptually different from any other crime. The conceptual differences are a result of the fact that virtually all works are presumed permissible. Thus a particular work is not illegal until a jury finds it obscene. This conceptual difference also prevents the wholesale seizure of books, magazines, and movies on the theory that they are contraband. *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Roaden v. Kentucky*, 413 U.S. 496 (1973). The conceptual differences arise from the "fine line which separates the obscene from the protected" and the desire to ensure full distribution of protected material. *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963). Also, unlike a crime such as theft, where the citizens' proper motto is: "when in doubt, don't," the first amendment allows, indeed encourages, citizens to take risks, to challenge the majority and to create discomfort. *Collin v. Smith*, *supra*, at 1206; citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949).

Organizations which deal in the distribution of books, movies and magazines, with no other accompanying illegal activity, are much different than organizations which deal in drugs, murder, theft, or stock fraud. This difference is a product of the protection given to their communicative functions. Should a distributor err, and sell obscene matter, the first amendment historically has not al-

lowed the suppression of future speech or the destruction of the errant company. *Near v. Minnesota*, 283 U.S. 697 (1931); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980).

Thus, Sappenfield submits that obscenity cannot constitutionally be a predicate offense of RICO because of the resulting impact upon first amendment rights. This Court has often held that statutes regulating speech must be carefully tailored. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). Such statutes must be finely drawn and require the use of sensitive tools to discern and enforce the boundary between protected and unprotected speech. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Carroll v. Commissioners*, 393 U.S. 175 (1968).

Conceptually, and in application, RICO was not intended as a sensitive tool. It is intended as judicial "heavy artillery" in the "war on crime." Given the practical difficulty of preventing improper conviction, *see, e.g., Jenkins v. Georgia*, 418 U.S. 153 (1974); *United States v. Thevis*, 526 F.2d 989 (5th Cir. 1976); *Shealy v. State*, 675 S.W.2d 215 (Tex. Ct. App. 1984), and repeated attempts at prosecution of mainstream non obscene items, e.g., *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (1980), this weapon should not be applied to speech related offenses. *Penthouse International, Ltd. v. McAuliffe, supra* is particularly instructive because it demonstrates, by inference, the manner in which the mere threat of RICO could be abused by an aggressive prosecutor. There, a local prosecutor brought obscenity charges against persons selling such magazines as *Penthouse* and *Playboy* in convenience food and drugstores and the Atlanta In-

ternational Airport. Also arrested was the president of a local distributor of the magazines. *Penthouse, supra,* at 1358, 1359. The district court had found that the actions of the prosecutor created an informal, impermissible prior restraint. *Penthouse International, Ltd. v. McAuliffe,* 436 F.Supp. 1241, 1256 (N.D. Ga. 1977). The court of appeals noted that the procedure enforced by the prosecutor was a "calculated scheme" which included public announcements, visits, and carefully timed arrests, which effected a constructive seizure of protected material. *Penthouse* at 1360. The court held that the prosecutor's policies were an impermissible system of prior restraint, in violation of the Constitution. *Penthouse* at 1362. In so holding, the court of appeals pointed to this Court's willingness to look beyond the form of a transaction and examine its substance. The court of appeals noted that "threats of prosecution or of license revocations have been enjoined in several cases." *Penthouse* at 1360 citing *Bantam Books, Inc. v. Sullivan, supra.* Sappenfield submits that the informal restraint and prior restraint condemned in *Penthouse* is not as significant as that which is effected by the threat of RICO.

Indeed, the facts of *4447 Corporation v. Goldsmith,* (87-740) clearly demonstrate the power which the mere threat of RICO gives a prosecutor when obscenity is a predicate offense. There, the prosecutor was able to obtain, *ex parte,* an order permitting seizure and closure of businesses, based upon mere accusations that the businesses sold sexually explicit material. No business selling protected material will risk offending a prosecuting official when a possible error in judgment means the effective death of the business.

This Court must reconize that prosecutors have occasionaly resorted to harassment of first amendment activity in order to achieve their goals. *Penthouse, supra.* A weapon such as RICO makes improper harassment easier because of the severity of its sanctions. The threat of RICO could allow an aggressive prosecutor to act as a *de facto* censor for an entire community.

Sappenfield submits that RICO cannot be applied to obscenity with the necessary regard for first amendment protections. Nor can it be modified to allow the necessary sensitivity and still serve its intended function. The impact of RICO, as applied to the predicate offense of obscenity under the Indiana statutory scheme, is so severe that its application to materials or offenses other than child pornography simply can not be accomplished with the necessary sensitivity to first amendment rights. *Speiser v. Randall, supra.*

## III

## THE INDIANA RICO STATUTE USING OBSCENITY AND OBSCENITY RELATED OFFENSES AS PREDICATE OFFENSES IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE, IN VIOLATION OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

In order to meet constitutional standards, a law must give persons of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Vague laws which deal with protected material have a "chilling effect" which forces distributors

to engage in self-censorship in order to avoid the risk of breaking the law. Vague or overbroad laws also suffer from the vice that they permit a "standardless sweep" that allows policemen, prosecutors, and juries to pursue their personal predilections. *Kolender v. Lawson,* 461 U.S. 352 (1983). As applied to businesses selling items protected by the first amendment, IC 35-45-6-2 fails. By using obscenity or obscenity related offenses as predicates, the Indiana RICO law becomes impermissibly vague and overbroad. Its vagueness creates an unprecedented chilling effect which renders the law unconstitutional.

**A) Both The Definition Of Obscenity Under Miller v. California, 413 U.S. 15 (1973), And The Indiana Courts' Application Of It Contribute To The Overbreadth And Vagueness Of The Indiana RICO Statute Using Obscenity As A Predicate Offense.**

Before turning to the portions of the RICO statute which render it unconstitutional as applied to obscenity offenses, Sappenfield notes that the vagueness of the legal test of obscenity contributes significantly to the overall vagueness of the RICO statute as applied to obscenity.

Sappenfield will not review the history of this Court's struggle to define obscenity. Nor will petitioner review the periodic criticism of the *Miller* standard launched by many commentators, lower court judges and, indeed, members of this Court. *See, e.g., Pope v. Illinois,* — U.S. —, 107 S.Ct. 1918 (1987). Analysis of the decisions of this Court and lower courts reveals that the *Miller* standard is notably inexact.

The definitional terms; "contemporary community standards," "purient interest," "patently offensive," and "serious value;" are so amorphous that the line between communications which are protected and those which are not is often too blurred to identify criminal conduct. *Smith v. United States*, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting).

The inherent vagueness of the *Miller* standard is compounded by the gloss placed upon it by the Indiana Supreme and Appellate Courts. In *Sedelbauer v. State*, 428 N.E.2d 206 (1981),[7] the Indiana Supreme Court held that the manner in which a particular subject is displayed will affect whether the material may be judged obscene. The court, speaking through its chief justice held:

> It is not the subject matter that is obscene in any situation, it is the manner in which the subject matter is presented that constitutes obscenity. For instance, a nude model may be presented to an art class to aid in the instruction of the students as to how to depict the nude human form. The model may be presented in a wholly acceptable manner and not be considered as lewd or obscene. However, one could take that same model and by a slight change in pose *and setting* transform that same person into a lewd and obscene object. The difference would be readily discernible to any member of society.
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> 428 N.E.2d at 208 (emphasis added)

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[7] *Sedelbauer v. State*, involved the prosecution of a bookstore employee for distribution of obscene matter. The appellate court described him as one whose "only act was to recite the price of the films when asked by the undercover vice squad officers." *Sedelbauer v. State*, 402 N.E.2d 1006 (Ind.Ct.App. 1980).

This gloss, a substantial deviation from *Miller,* is of great significance. In a RICO/obscenity trial, Indiana juries may consider, as evidence of obscenity, the fact that a business is an "adult bookstore." This deviation allows, indeed, encourages, *ad hoc,* unguided decisions by juries. Indiana citizens face an inherently unfair situation in which non obscene work may become obscene solely because of the name given to the store in which it is sold.

Thus, at least in Indiana, those wishing to determine if a particular work "crosses the line" must somehow *know*:

(1) The communty standards of a particular county at that point in time,

(2) Whether material appeals to a normal interest in sex,

(3) The acceptable level for depiction of sex in a particular county at that time,

(4) Whether or not the work has "serious value," and,

(5) Whether the setting and manner of the sale or presentation is "appropriate."

To make the decision whether or not to sell a particular item, the business owner, and indeed the clerks who work for him, must have the skills of a psychologist, sociologist, anthropologist, media critic, art critic, educator, and environmental expert. Petitioner submits that the skills of a clairvoyant would perhaps be most helpful.

The distributor of books, magazines, and movies is faced with the virtually impossible task of discerning at what point he may be violating the law. Under these cir-

cumstances, the only safe course of action is to avoid distribution of *any* controversial material.

Conversely, a prosecutor has a whole range of subjective criteria upon which to base a decision to prosecute, including the setting of a particular sale.[8] Thus, the situation contains the lack of precision and the capacity for prosecutorial overreaching which are inherent in a vague law.

This inherent lack of precision may well be acceptable in a misdemeanor law carrying relatively minor penalties. *cf. Kolender v. Lawson, supra.* However, when it is used as the basis of prosecution which could carry over twenty years of imprisonment, substantial fines, and forfeitures, then its alleged utility is far outweighed by the adverse impact and chilling effect the law places upon constitutionally protected rights.

**B) The Indiana RICO Statute, Using Obscenity As A Predicate Offense, Is Overbroad And Vague Because Of Its Enormous Scope And The Resulting Chilling Effect Upon Free Speech.**

**C) The Minimal Requirement Of "Participation In" A RICO "Enterprise" When Obscenity Is A Predicate Offense, Under The Indiana Statute, Contributes To The Unconstitutional Vagueness And Overbreadth Of The Indiana RICO Statute Using Obscenity As A Predicate Offense.**

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[8]Other than his conscience, there is little to prevent a prosecutor from concluding, in good faith, that a particular magazine or book meets the *Miller* test. *See, e.g., Penthouse v. McAuliffe, supra; Jenkins v. Georgia, supra; United States v. Head,* 317 F.Supp. 1138 (E.D. La. 1970).

The chilling effect of the obscenity definition increases to frightening proportions when combined with IC 35-45-6-2.

Under this statute, one who

(1) Knowingly *or* intentionally receives proceeds, directly *or indirectly* from a violation of 35-49-3 (obscenity) and who buys real estate or owns or operates a business

or

(2) Through violation of IC 35-49-3 (obscenity) and who buys real estate or owns or operates a business

may be guilty.

While IC 35-45-6-2(1) and (2) have an overly broad sweep, the impact of IC 35-45-6-2(3) is astounding. Because "pattern of racketeering" includes those who aid, abet and conspire, subsection (3) punishes anyone who is:

*associated* with or *employed* by a business and who directly or indirectly participates in that business by committing or *assisting* or conspiring in the commission of an obscenity offense.

The statute thus makes criminal, activities which are completely lawful unless undertaken in conjunction with a business selling communicative materials.

The potential reach of the statute is obvious. Section one of the statute makes it illegal for a leasing company to obtain rent from a business which "crosses" the line and sells obscene matter. Those who sell utilities, or provide any one of the host of services which modern business requires, to adult stores selling sexually explicit ma-

terials come under the statute's sweep pursuant to section three.

For example, Fantasy I & II openly sell erotic material. Any landlord, salesperson, or clerk who might rent to them, sell them products, or work there, would know the nature of the business and the types of items offered for sale. Any rent payments, payments for goods, or a paycheck could be proceeds derived from the sale of obscene material. If the recipient should deposit those proceeds in his business account or his personal account, he could be liable under the statute, thereby facing imprisonment and forfeiture.

Those who provide necessary services to petitioner, knowing the nature of his business, could be charged under the theory that they are aiding and abetting the commission of obscenity offenses. Employees may be direct violators or conspirators. The statute clearly reaches not only those who own lawful businesses but individuals who work there, the innocent landlord and the incidental providers of necessary services.

This interpretation is not tortured. In *4447 Corporation v. Goldsmith, supra,* (the companion in the Indiana Supreme Court to case 87-470 in this Court), the prosecutor sued the landlord and obtained, and continues to have injunctive relief in the form of the complete closure of his property to new, unrelated tenants. These circumstances are detailed in the *Amicus Brief of Burke Mendenhall, Ft. Wayne Books v. Indiana,* 87-470. The experience of Mendenhall demonstrates that the law is subject to the arbitrary and discriminatory enforcement which is the hallmark of a vague or overbroad law. *Grayned, supra; Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

**D) The Inherent Vagueness And The Resulting Chilling Effect Of RICO, As Applied To Obscenity Offenses Is Compounded By The Minimal Scienter Required For Criminal Liability By The Indiana Courts.**

IC 35-49-3 (obscenity) has been held to require knowledge *only* to the extent that one have knowledge of the *general* nature of the business and the materials offered, i.e. "X-rated." *Richards v. State*, 461 N.E.2d 744 (Ind. App. 3 Dist. 1984); *Sedelbauer v. State, supra.*

For example, in *Sedelbauer v. State, supra,* the Indiana Supreme Court held that knowledge of the general character of the items offered for sale provided the necessary knowledge required by *Smith v. California,* 361 U.S. 147 (1959).

The Indiana Supreme Court stated:

> Appellant next asks the question, "Is the evidence constitutionally sufficient to support a finding of scienter, where the defendant did not know the nature and character of the contents of the material sold?" This question by the appellant borders on the ludicrous. Any adult human being who could pick up the packages, above described, and sell them to a customer in a store, as above described, would indeed be out of touch with reality if he did not know and understand the nature of the object he was selling. *Sedelbauer,* 428 N.E.2d at 210.

Thus, knowledge of the nature of the products the business offers (erotic material) apparently satisfies the requirement of scienter.[9]

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[9]State and Federal courts apply the scienter concept differently. Some require proof of actual knowledge of the contents of a film. *See, e.g., Shealy v. State, supra.* Others, like Indiana, allow constructive knowledge.

This is constitutionally deficient because merely knowing that one deals in erotic material cannot provide knowledge that a particular item is legally obscene or that there have been multiple violations of the obscenity law. Such constructive knowledge must have a significant impact upon first amendment rights.

In *Smith v. California, supra* at 153 and 154, the court held:

> *By dispensing with any requirement of knowledge of contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter.* For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of scienter that: 'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omni-science.' [citations omitted]. And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. *The*

> *bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.* Through it, the distribution of all books, both obscene and not obscene, would be impeded.

(Footnotes omitted and emphasis added.)

The self censorship condemned in *Smith* pales compared to the self-censorship which will be imposed under the Indiana statute. Each provider of services, the telephone company, water company, cleaning services, bookkeepers, each landlord, and each clerk will have a manifest need to ensure that only the *least* controversial materials are offered for sale. It is not difficult to imagine that the landlord or yellow pages representative might say, "I won't sell or rent to you if you sell any 'X' rated, or 'R' rated material."

When the vagueness of the line between protected and unprotected speech is coupled with the minimal concept of "participation in" a racketeering enterprise and the minimal "knowledge" requirement, an insurmountable burden is placed upon those who sell sexually explicit material. If the distributor were facing a severe prison sentence only, there would be a significant chilling effect which would render the RICO/obscenity combination unconstitutional. When the forfeiture and seizure provisions are added, the unconstitutional nature of the RICO approach to obscenity is readily apparent.

The Indiana RICO action is premised on two predicate acts. Sale or display of the same item at two times on the same day is sufficient. If a jury concludes that the items are obscene, no other real proof of the "pattern of racketeering activity" is necessary.

It is clear that this law may be used, not only to prevent the sale and exhibition of materials by "racketeers," but also to chill and discourage any persons from distributing sexually explicit materials, including those which are constitutionally protected.

Because of the severe penalties for guessing wrong, no business will accept the risk of continuing to display or distribute explicit material. Thus, Indiana has created an irreversible, insidious, prior restraint by virtue of the existence of the RICO statute in its present form as applied to allegedly obscene materials.

The RICO statute was created to pursue racketeers. In its present form, it has been, can and will continue to be applied to "Mom & Pop" enterprises whose only "crime" is to sell or display sexually explicit material. This is a threat to first amendment freedoms which this Court must not tolerate.

## IV

## IF THE INDIANA RICO STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD, THEN THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT PREDICATE OBSCENITY OFFENSES MUST BE AFFIRMED CONVICTIONS ON SUCCESSIVE DATES ARISING FROM ACTS COMMITTED IN THE SAME JURISDICTION AS THAT WHERE THE RICO CHARGE IS BROUGHT.

Sappenfield submits that, if obscenity can properly be a predicate offense of RICO, and, if the Indiana RICO act as applied to obscenity is not impermissibly vague and overbroad, then specific safeguards must be employed to ensure that the requisite sensitivity exists to render the statute constitutional.

Foremost among the necessary safeguards is a requirement that predicate offenses be in the form of prior, properly obtained convictions where the second offense occurs after the first conviction and where a third "RICO triggering act" occurs after the second conviction. Sappenfield also submits that *all* convictions must arise in the same jurisdiction, for example, Howard County, Indiana.

The reasons for these requirements are obvious. "Contemporary community standards" are, at best, difficult to quantify. Many commentators and cases discuss how difficult they are to determine. Common sense tells us that any measure of community standards will pinpoint those standards only at a given point in time.

RICO was intended to prosecute the indiviuals who, over a substantial period of time, chose to engage in multiple criminal offenses for economic gain. However, unlike those dealing in murder or drugs, those selling books or movies can not *know*, at the time a sale occurs, that a particular item violates contemporary community standards. They may believe, based upon the level of sales or lack of complaints that certain material is acceptable to the community. They may honestly believe, that a given work has "social or artistic value."

The distributor will have guidance *only* when a jury properly composed and instructed, and having heard all relevant evidence, returns its verdict. However, that ver-

dict will reveal public attitudes only at a given point in time. Because of the breadth given first amendment rights, one should have the right to continue "testing the waters." Thus, a second criminal distribution and conviction is necessary before the authorities can have some reasonable belief that the organization is unwilling to comply with the standards of a given community. Only with this knowledge and a third alleged violation should authorities be allowed to unleash RICO.

Because community standards may vary from location to location, only trial convictions based upon the community standards of a particular jurisdiction may be utilized as predicate offenses. It is unfair for a jury in Howard County to use alleged violations of the standards of LaPorte County in judging whether Sappenfield has violated the community standards of Howard County.

Similarly, guilty pleas by individuals with no ownership interest in a business, clerks, for example, cannot serve as predicate convictions. Non-owners simply do not have the requisite interest in litigating the first amendment values of a work that the owners of a business have. A guilty plea, especially that of a clerk, may be based upon many considerations, the least of which is whether a particular book, magazine or movie is obscene. Therefore, only an affirmed trial conviction for obscenity can constitutionally serve as a predicate for a RICO charge.

## V

## IF THE INDIANA RICO STATUTE, USING OBSCENITY AS A PREDICATE OFFENSE, IS NOT VAGUE AND OVERBROAD, THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT THERE BE A FULL, PROMPT ADVERSARY HEARING FOCUSING UPON THE ALLEGED OBSCENITY OF ITEMS CONSTITUTING THE ALLEGED PREDICATE ACTS. THE BURDEN OF PROOF AT THIS HEARING MUST BE GREATER THAN "PROBABLE CAUSE".

Under Indiana law, a person arrested for a misdemeanor obscenity offense is entitled to a hearing on the probable obscenity of items seized. IC 35-49-2-4.[10] However, when one is arrested on a warrant for a felony, issued by a court of proper jurisdiction, one is not entitled to a hearing on the issue of probable cause. *Remsen v. State*, 495 N.E. 2d 184, 189 (Ind. 1986); *Poindexter v. State*, 374 N.E. 2d 509, 513 (Ind. 1978). Thus, in Indiana, one arrested for RICO with obscenity predicate offenses is not entitled to the required prompt judicial determination of probable obscenity in an adversary proceeding as required by *Heller v. New York*, 413 U.S. 483 (1983) and allowed by the statute. The constitutional harm is obvious. Given the threat to protected rights the RICO accusation

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[10]It is unclear what the practical effect of this hearing is in Indiana. Petitioner is advised that in two cases in Lake County, Indiana, *Senneca Products v. State*, 3C8611250 (Lake County Court, Div. 3) and *Allied News, Inc. v. State*, 2C871850 (Lake County Court, Div. 2) the court found that items seized were probably not obscene. Notwithstanding this finding, the court and the prosecutor refused to dismiss the case. In an unpublished order, the Indiana Court of Appeals refused to hear an interlocutory appeal. Both cases remain pending.

creates, a defendant must have the right to litigate the probable obscenity at the earliest possible moment. Nothing less will satisfy the command of the first amendment.

Moreover, at said hearing, a court constitutionally must be required to utilize a standard more burdensome than "probable cause." Minimally, the "clear and convincing" standard is constitutionally required. *California ex rel. Cooper v. Mitchell Brothers,* 454 U.S. 90 (1981). However, given the interests at stake and the magnitude of the threat to protected speech, a non-binding finding by the judge of obscenity "beyond a reasonable doubt" may be required. *McKinney v. Alabama,* 424 U.S. 669, 678 (1976) (Brennan, J., concurring).

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## CONCLUSION

Throughout the 1970's and 1980's, there has been a dramatic increase in national and local community acceptance of sexually explicit material. Much is now shown on "network" or cable television which previously would have been deemed patently offensive. There has been a corresponding increase in the availability and consumption of sexually explicit books, magazines, and video tapes.

What was shocking or obscene years ago, for example, *Lady Chatterly's Lover,* is now considered a work of art.

Some argue that "pornography" is a four billion dollar industry which must be destroyed. A converse argument may be made that the level of expenditures demonstrate wide spread national satisfaction with the ready availability to adults of sexually explicit material.

The increasing use of RICO, in a criminal setting as applied to obscenity and obscenity related offenses, represents perhaps the greatest threat to first amendment rights in the history of the nation. The fear of RICO, its forfeiture and its harsh prison sentences, will simply drive from the marketplace all controversial sexual material. As that, which is now closest to the line, is driven from the market, pressure will increase upon other works. Historically, the appetite of the censor is voracious. Petitioners request the Court to end this threat by reversing the decision of the Indiana Court of Appeals, First District and hold that the Indiana Criminal RICO statute violates the United States Constitution.

Respectfully submitted,

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Nos. 87-470 and 87-614

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1987

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No. 87-470

FORT WAYNE BOOKS, INC.

*Petitioner,*

v.

STATE OF INDIANA, et al.,

*Respondents.*

No. 87-614

RONALD W. SAPPENFIELD, et al.,

*Petitioners,*

v.

STATE OF INDIANA,

*Respondent.*

---

## ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA AND THE INDIANA COURT OF APPEALS

---

## BRIEF OF RESPONDENTS STATE OF INDIANA AND STEPHEN M. SIMS ON THE MERITS

---

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## QUESTIONS PRESENTED FOR REVIEW

1. Is the Indiana criminal RICO statute (I.C. 35-45-6-1 *et seq.*, the Indian Corrupt Business Influence Act) as applied to obscenity offenses unconstitutionally vague in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Does the use of obscenity or an obscenity related offense, other than child pornography, as a predicate offense of the Indiana RICO statute violate the First Amendment to the Constitution of the United States?

3. Is Indiana's criminal RICO statute violative of the First and Fourteenth Amendments to the Constitution of the United States to the extent that it allows prosecution for criminal RICO on the basis of two or more allegations of obscenity violations which have not been reduced to convictions?

4. Are the first amendment procedural safeguards of *Heller v. New York*, 413 U.S. 483 (1973) violated by a state law which allows the arrest and prosecution of an individual for criminal RICO based upon predicate allegations of obscenity violations, not reduced to conviction, without allowing, post-arrest, a prompt adversary hearing to determine the probable obscenity of items upon which the prosecution is based?

5. Is Indiana's civil RICO statute, authorizing pre-trial padlocking and post-trial forfeiture of entire communicative businesses solely on the basis of two or more obscenity offenses, facially unconstitutional under the First Amendment as a prior restraint on protected expression?

6. Do the forfeiture, padlocking and other sanctions of Indiana's civil RICO statute, constitute an overly broad means of regulating the dissemination of obscenity?

7. Do the Indiana civil RICO statute's pre-trial sanctions of mass seizure and padlocking lack sufficient First Amendment

procedural safeguards where they can be imposed based solely upon an *ex parte* probable cause determination of obscenity?

8. Do seizure, padlocking and forfeiture sanctions such as those upheld by the Indiana Supreme Court, violate the First Amendment by unduly chilling the exercise of protected expression?

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## ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA AND THE INDIANA COURT OF APPEALS

---

## BRIEF OF RESPONDENTS STATE OF INDIANA AND STEPHEN M. SIMS ON THE MERITS

---

## OPINION BELOW

### I.

### SAPPENFIELD V. INDIANA

The decision of the Indiana Court of Appeals, First District, published at 505 N.E.2d 504 (1987) appears in the Appendix

hereto. (Consolidated Joint Appendix 176, hereinafter referred to as "J.A."). A timely petition for rehearing was filed and denied without opinion. (J.A. 182). A timely petition for transfer was filed with the Supreme Court of Indiana and was denied without opinion. (J.A. 183).

## II.

## FORT WAYNE BOOKS, INC. V. INDIANA

The decision of the Supreme Court of Indiana reported as *4447 Corporation v. Goldsmith* is published at 504 N.E.2d 559 (Ind. 1987) and is printed at pages 104-112 of the Appendix to the Petition for a Writ of Certiorari. The decision of the Indiana Court of Appeals is published at 479 N.E.2d 578 (Ind. App. 1985) and is printed at pages 28-98 of the Appendix to the Petition for a Writ of Certiorari.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**FIRST AMENDMENT** — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**FIFTH AMENDMENT** — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**FOURTEENTH AMENDMENT § 1** — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of Indiana Code Chapter 34-4-30.5 (Indiana's civil RICO statute), Indiana Code Chapter 35-45-6 (Indiana's criminal RICO statute), and Indiana Code Section 35-49-2-1 (Indiana's statutory definition of obscene material) are set forth in Appendix A of this brief.

## STATEMENT OF THE CASES
## SAPPENFIELD V. INDIANA

In 1984 a local law enforcement officer purchased several magazines at two stores allegedly owned or operated by the Petitioners. The magazines contained graphic photographs of homosexual and hetersexual activity (*Sappenfield* Record 20-23, 65-275). After examining the magazines, the county prosecuting attorney filed criminal charges against the Petitioners alleging that the Petitioners had participated in the distribution of obscene material in violation of the criminal laws of Indiana (J.A. 135, 138-149). Among the eight counts of the charging information were two counts (Counts IV and VIII) which alleged violations of Indiana's Criminal RICO statute.

On June 4, 1985, the Petitioners moved to dismiss Counts IV and VIII (the RICO Informations) on the grounds, *inter alia*, that the RICO statute was unconstitutionally vague and violative of the Fourteenth Amendment (J.A. 150). On September 18, 1985, the trial court held that the RICO statute could not constitutionally be applied to violations of the Indiana obscenity statute (J.A. 173). The decision of the trial court was reversed by the Indiana Court of Appeals.

Respondent Stephen M. Sims, as prosecuting attorney, secured 39 criminal convictions against various people employed by the Petitioner and others for distributing obscene material at certain business locations. On March 19, 1984, the prosecuting attorney filed a complaint in the Allen Circuit Court alleging that the Petitioner and other named defendants had engaged in a pattern of racketeering activity (J.A.8).

Following an *ex parte* hearing, the Allen Circuit Court found that probable cause existed to support a finding that the assets of the Petitioner were derived from or being used in a pattern of racketeering activity. The trial court ordered the seizure and inventory of Petitioner's assets.

The Petitioner participated in hearings before the trial court on March 29, 1984, and April 4, 1984 (Fort Wayne Record 478, 574). No trial date has been set by the trial court in this case because the Petitioner sought an Extension of Time Within Which to File an Answer to the Complaint (Fort Wayne Record 640), and immediately thereafter deprived the trial court of jurisdiction by initiating an interlocutory appeal (Fort Wayne Record 646).

## SUMMARY OF THE ARGUMENT

This Court has consistently ruled that the states may prohibit the distribution of obscene material. Obscene communicative material is not entitled to First Amendment protection.

If Indiana can show that the Petitioners have engaged in the criminal act of distributing obscene material, then Indiana may impose criminal and civil sanctions against the Petitioners.

Indiana asserts that persons engaged in a pattern of criminal activity may not shelter the assets derived from or used in the criminal activity by combining the criminal activity with an enterprise which is entitled to First Amendment protection. Thus, a person who uses a newstand as a front for illegal gambling activities cannot prevent the government from seiz-

ing his place of business. Nor can a person who profits from the sale of illegal drugs invest the profits in a radio station and thereby prevent the government from tracing and seizing the profits. The question is whether criminal assets are secure from government seizure when the assets are invested in speech related activities.

## ARGUMENT

### I.

### THE INDIANA OBSCENITY STATUTE

The Indiana Obscenity Statute (Ind. Code 35-49-2-1, App. A) is an almost direct enactment of this Court's main holding in the benchmark case of *Miller v. California* 413 U.S. 15 (1973). The elements of "obscene matter of performance" are whether:

> (1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;
>
> (2) The matter of performance depicts or describes, in a patently offensive way, sexual conduct; and
>
> (3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The statute specifies "contemporary community standards" as the test to determine whether the appeal to the prurient interest in sex is predominant. In *Smith v. United States* 431 U.S. 291 (1977) this Court added that "patent offensiveness" is also to be judged by the same standard. But *Smith v. U.S.* also pointed out that the third prong of the *Miller* test, the lack of serious literacy, artistic, political, or scientific value is *not* to be determined by that standard, but rather on the question whether a reasonable person would find such value in that material, taken as a whole. *Pope v. Illinois*, ___U.S. ___, 107 S.Ct. 1918 at 1921, (1987). *Miller* also required that a state must specifically define the "sexual conduct" whose depiction

or description is subject to being alleged obscene. Indiana has complied: The matter or performance must depict or describe "sexual conduct." Ind. Code 35-49-2-1(2). "Sexual conduct" is exactly defined in objective factual terms under Indiana Code 35-49-1-9 (App. A).

When Indiana's statutory scheme on obscenity is viewed as a whole, it clearly requires the existence of the depiction or description of the items described in Ind. Code 35-49-1-9. In other words, explicit sexual activity. This depiction must be so gross as to be "patently offensive". The matter in which it is imbedded must not only appeal as a whole to the interest in sex, but to the "prurient" interest therein; moreover, this must be the dominant theme of the work. Even so, such work still cannot predicate a RICO action unless it lacks serious literary, artistic, political, or scientific value.

*Miller* explicitly holds that works defined by the standard enunciated therein are not protected by the First Amendment. It seems to be a common tactic by persons subjected to an obscenity action to assert that one or another work, clearly outside the *Miller* standard or the given statute, and hence not subject to the State action, is within it, and postulate a hypothetical future prosecution of such works. in this instance, as we have seen, petitioners seek to dress their unprotected product in the First Amendment armor borrowed from *Playboy*, *Penthouse*, prospective 20th Century Fox or Universal films, and some hypothetical videotapes or books speculatively sold by Walden books or B. Dalton's. Overlooked is the fact that such material rarely depicts "sexual conduct" as defined by the statute, does not do so in a "patently offensive" way, does not lack the requisite value, and when taken as a whole does not appeal to the *prurient* (i.e., unhealthy) interest in sex.

Thus, taken either as a substantive penal statute directed against obscenity or as a predicate to RICO action, Indiana's criminal obscenity statutes are properly circumscribed to assure against encroachment on First Amendment grounds.

## II.

## INDIANA'S RICO STATUTES: VAGUENESS, OVERBREADTH CHILLING EFFECT

The Indiana RICO statute closely resembles the federal RICO legislation found at 18 U.S.C. § 1961 *et seq.*. The policy reasons for the adoption of RICO statutes are clearly set forth in *Russello v. United States*, 464 U.S. 16 (1983), and need not be repeated here. The federal RICO statute has withstood challenges for vagueness and overbreadth. *See U.S. v. Tripp*, 782 F.2d 38 (6th Cir. 1986) *cert. den.* 106 S.Ct. 1656; *U.S. v. Martino*, 648 F.2d 367, reconsidered in part 650 F.2d 651 (5th Cir. 1981) *cert. den.* 456 U.S. 943, 949, *on reh.* 681 F.2d 952 affirmed 104 S.Ct. 296; *U.S. v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978) *cert. den.* 441 U.S. 933.

Facially, Indiana's RICO statute is no broader or more vague than the federal legislation.

In *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794 (1985) this Court dealt with constitutional overbreadth and reaffirmed the following guidelines for review of state statutes:

1. Never anticipate a question of constitutional law in advance of the necessity of deciding it.

2. Never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

3. One to whom applicability of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

4. The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.

5. A law maybe narrowed by (1) legislative action, (2) judicial construction or (3) partial invalidation.

6. If a term in a statute is potentially overbroad, the law should be invalidated only so far as the term is to be understood as reaching protected materials.

7. Even if a term can only be interpreted in an unconstitutional sense, the proper remedy is to excise the term and leave the rest of the statute in place.

The danger most feared by the Petitioners is that a RICO civil action will close down and seize assets of an enterprise defined in the criminal RICO statute (IC 35-45-6-2) as being conducted though a pattern of racketeering activity; or an enterprise acquired or maintained, conducted, or derived through such activity. Among the complaints lodged in this Court about the RICO statute is that its effects are "Draconian." If so, this effect is unrelated to the nature of the business seized or the violation alleged as a predicate, and independent of any speech material that may be involved. RICO's purpose is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, *supra*. The federal RICO statute's provisions are to be liberally construed to effectuate its remedial purposes. *United State v. Turkette*, 452 U.S. 576 (1981). Indiana's Supreme Court has recognized that the seizure of assets acquired through racketeering was one of the statutes most important remedies. The mere contention that the RICO statute is a strong remedy does not establish that it is improper.

The Indiana Supreme Court in *Goldsmith v. 4447 Corporation*, 504 N.E.2d (1987) correctly recognized that First Amendment protections do not extend to any of the matter which can be used to predicate a RICO action based on obscenity dealing. As demonstrated at length above, Indiana's obscenity statute reaches only *unprotected* speech. Since no RICO predicate offense can infringe on First Amendment territory, the fact that a species of speech is involved in obscenity cannot be used to distinguish an obscenity racket from, for instance, a drug, prostitution, gambling or even an arson or murder for hire racket for purposes *either* of charging a criminal RICO violation *or* seizing assets of such an enterprise

derived from or conducted through a pattern of racketeering activity.

Petitioners and *amici* cite a number of obscenity and prior restraint cases going back as far as the classic *Near v. Minnesota*, 283 U.S. 697 (1931). What these cases all have in common, however, is that the prospective State action was explicitly premised on some content of the speech aspect of the material (or on prospective speech content in the *Near* and other prior restraint cases). The speech involved was sought to suppressed on the theory that it was obscene, or would be libelous, or would threaten public order. (E.g. *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

But a civil forfeiture and seizure action under RICO remedies does not concern the identity of the items seized. Its clear intent is to attack the incentive for racketeering enterprises by seizing the business stock of the enterprise and/or all property derived from the enterprise — what could best be called "ill gotten gains".

Goods so seized can be anything from a stock of stolen cars, auto parts, and repair manuals used in a stolen car "chop shop" racket, to school bonds or a collection of Picassos bought with the profits. The cars, parts, manuals, bonds and paintings should be and are equally subject to seizure and forfeit under the civil RICO act. This is so even though a Picasso painting is clearly an item of speech, and one with undeniable artistic value as well and hence is protected speech.

Petitioners are seeking nothing less than the creation of an exemption for an entire class of property from RICO seizure. They wish to appropriate the First Amendment and use its hard-won protections for the purpose of establishing a "safe" class of property that can be invested in and used in racketeering enterprises, or which can be purchased through the procedes of racketeering, secure from the threat of RICO seizure forfeiture. If the Court were to adopt the confusion between First Amendment prior restraint law and RICO seizures fostered by Petitioners it would be doing no less than opening the

entire field of First Amendment protected property and enterprises as safe havens — and thus targets — for investment of the procedes of organized crime. Racketeers could put their money in Byzantine icons or Renaissance religious art. They could buy speech-related businesses from bookstores to daily newspapers from video stores to TV networks. The clear purpose of the RICO statute would be vitiated if the defendant in a seizure action could prevent it by a claim that among the property was protected — or even just "presumptively protected" — speech.

The Indiana court in the *4447* case recognized this when it held "that the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering laws is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene."

In making that holding, the Indiana court followed the holding of the Federal district court in *Western Business Systems, Inc. v. Slaton*, 492 F.Supp. 513 (N.D. Ga. 1980), which also held that any chattel derived from racketeering was subject to seizure "totally unrelated to their contents." The forfeiture, the district court held, was not due to any likelihood of obscenity, "but because they were personal property realized through or derived from crime." *Id.* at 514.

Petitioners, and to an even greater extent the *amici*, profess a fear that indiscriminate attacks on speech-related business might ensue based on sexually explicit but protected materials. It has already been shown that underlying obscenity statute is carefully drafted to include only the material that this Court has held, in *Miller* and elsewhere, to be unprotected.

Parties and *amici* present no suggestion that any of the seizures that occurred in these cases was based on predicate

material that actually was subject to First Amendment protection. There is no showing of any prospect that a film studio or theatre business would be shut down for distribution of Bertolucci's *Last Tango in Paris* or Nichol;s *Carnal Knowledge*; or that a bookstore or chain of stores would be seized for selling *Penthouse* or even such sexually explicit material as Anais Nin's frankly acknowledged erotic writings titled *Delta of Venus*. Indeed, all these titles have been available to adults in Indiana without suppression by the State.

Indiana's statute, in short, provide for judicial determination that there is probable cause to believe that an enterprise has knowingly and intentionally undertaken a pattern of distribution of obscene matter as a criminal offense. While it is true that probable cause was shown *ex parte* in these cases, it is also true in general that an opportunity for adversary consideration of the status of the predicate allegedly obscene matter was rejected in favor of pursuing these interlocutory actions. There is no reason to thus assume that, when predicate matter is seized or brought as evidence of a violation of IC 35-49-3-1 as a basis for RICO actions rather than direct obscenity violations, in such cases an adversary hearing is not available to the defense to examine the predicate matter. There is no reason, however, to provide such a hearing for the business assets seized under the RICO act since, as shown above, First Amendment issues are not relevant.

Since Indiana's obscenity statute is carefully circumscribed so as to affect only unprotected speech, and provides a clear workable definition of what is obscene, neither it nor RICO criminal and civil actions predicated upon it are unconstitutional. The racketeer has control over what business stock to acquire for his racket or into what goods he will invest his racketeering procedes. If First Amendment protected matter is chosen by him, then that is his choice, not the State's. The government ought to be able to pursue racketeering procedes no matter into what form the racketeer has chosen to convert them. The State action in seizing them is directed against that choice, not against their content. Since content of the matter

seized under RICO is irrelevant to the action, then can be no constitutional objection based on their content. Indiana's obscenity and RICO statutes, facially and as interpreted, are not improper.

## III.

## EX PARTE HEARING AND SEIZURE

The Petitioners contend that Indiana's RICO statutes are deficient 1) because they do not require that an *adversary hearing* on the question of obscenity *precede* a seizure under the statute, 2) because they do not guarantee that the restraint imposed will be of *short duration*, 3) because they do not ensure *prompt appellate review* of either interim or permanent seizure orders, and 4) because the statute does not require that the State satisfy a standard of proof greater than the probable cause standard.

Indiana's RICO statute should not be invalidated simply because it does not require that a seizure be preceded by an adversary, as opposed to *ex parte*, hearing on the issue of obscenity. *Heller v. New York*, 413 U.S. 483 (1973) indicates that a statutory scheme which 1) provides that seizure is to be preceded by a judicial determination of probable cause, and 2) makes *available the opportunity for post-seizure review* in an *adversary* proceeding, is sufficient for First Amendment purposes. 413 U.S. 489, 492-493. While *Heller* is distinguishable from the case at bar by virtue of the fact that the seizure in *Heller* was accomplished in order to preserve evidence for trial, 413 U.S. at 491, the Supreme Court's discussion of the type of hearing which is required in order to safeguard First Amendment rights is instructive. After noting that it had earlier held that only a judicial determination in an adversary setting is sufficient to impose "a valid *final restraint*" (Emphasis added), the *Heller* Court explained that it had *not* required, and by implication was not going to require "that the advisory hearing taken place prior to *initial* seizure". 413 U.S. at 490.

*Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964) 1723, 12 L.Ed.2d 890, and *Marcus v. Search Warrants of*

*Property at 104 East 10th St., Kansas City, MO*, 367 U.S. 717 (1961) held, as the Court explained in its decision in *Heller*, that a seizure of a large quantity of books "for the sole purpose of their destruction" requires "*a prior judicial determination of obscenity in an advisory proceeding*". *Heller*, 413 U.S. at 492. In *Heller* the Court reaffirmed this requirement, stating "We do not disturb this holding. Courts will continue to scrutinize my large-scale seizure of books, films or other materials presumptively protected under the First Amendment to be certain that the requirements of a *Quantity of Books* and *Marcus* are fully met." *Heller*, 413 U.S. at 492. *Marcus* and a *Quantity of Books* are factually distinguishable from *Heller* and *Fort Wayne Books*, because they each involved seizures which were not based upon a prior and independent judicial determination of obscenity.

Further, as noted in *Heller*:

> The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation.

(402 U.S. at 367).

In the *Sappenfield* case, there has been *no ex parte* hearing resulting in a seizure of assets. In the *Fort Wayne Books, Inc.* case, the Petitioner was provided with an immediate adversary hearing. (*See Statement of the Case, supra*). Any delay in the ultimate resolution of factual issues in *Fort Wayne Books* is attributable to the Petitioner who instituted an interlocutory appeal.

Petitioner's reliance on *California ex rel. Cooper v. Mitchell Bros.*, 454 U.S. 90, (1981), at 93, is apparently misplaced. The Petitioner's reliance is misplaced for the very reason indicated in his Petition for Certiorari; the Supreme Court "did not resolve the question of the minimal standard of proof that is

constitutionally required" to permanently restrain exhibition of a specific allegedly obscene film. Other cases, however, such as *Heller*, 413 U.S. at 494, and *New York v. P.J. Video, Inc.*, 106 S.Ct. 1610, at 1614-1616 (1986), strongly suggest, if they do not dictate, that the probable cause standard is sufficient to protect First Amendment rights. *See also*, *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982), and *United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

## IV.

## LEGITIMATE STATE INTERESTS

As noted by this Court in *Russello*, *supra*, state and federal governments have a strong and legitimate interest which is expressed in RICO legislation.

There is no evidence that Indiana's inclusion of obscenity as one of the predicate RICO offenses was a pretext for simply closing adult bookstores, (*See* Concurring Opinion of Justice O'Connor in *Arcara v. Cloud Books* 106 S.Ct. 3172 at 3177 (1986), in which it was pointed out that such a pretexual use of a *nuisance* statute would implicate First Amendment concerns), and the RICO statute's forfeiture provision does not discriminate with regard to the content of the property to be seized and ultimately forfeited. The United States District Court for the Southern District of Georgia, in its opinion in *Western Business Systems v. Slayton*, 492 F.S. 513, at 514 (1980 N.D. Ga) followed just such an approach in rejecting the argument that Georgia's RICO statute constituted an unconstitutional prior restraint as applied to the predicate offense of obscenity:

> At this preliminary point in the litigation, it seems to the court that plaintiffs have grounded the prior restraint portion of their case on a misreading of the statute. Plaintiffs' argument assumes that printed materials would be subject to forfeiture under GA.Code 26-3405 because the owner-operator had two prior obscenity convictions in connection with this or other businesses, and the forfeited materials were used in the same kind of business. They argue that the statute thus allows forfeiture of printed

> matter on the basis that it is probably obscene, and therefore this constitutes a prior restraint. This attempted reading does great violence to the words of the statute.
>
> As the court reads the statute, Ga.Code § 26-3403 prohibits the acquisition even of legitimate businesses with the proceeds of racketeering (as defined). *Under § 26-3405 all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds, is subject to forfeiture to the state. These chattels might be anything from from gardening equipment to cook books, and might also be sexually explicit materials. Forfeiture could apply to any chattel whatever, if it was acquired with the proceeds of racketeering. Thus, if the items seized are books or movie films, the seizure is totally unrelated in their contents. They would be forfeited under the statute not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime.*
>
> Similarly, the law enforcement officer authorized by § 26-3405(d)(2) to seize materials prior to the filing of a complaint would be seizing them upon probable cause to believe that they were subject to forfeiture, and not—as plaintiffs argue—upon his personal judgment that the objects are obscene. We must keep in mind that these objects may be anything.

(Emphasis added). The Idaho Supreme Court's decision in *State ex rel. Kidwell v. U.S. Marketing Inc.* (1981), Idaho, 631 P.2d 622, at 628-629, contains an excellent general discussion of civil forfeiture actions and prior restraint, and also accepts the premise that the state may impose a forfeiture "on neutral and innocent property used in the commission of forbidden acts."

## CONCLUSION

While it is possible for this Court to hold that communicative material can only be seized after an opportunity for an adversary hearing, such a holding is not mandated by the Constitution and is not support by case law of this Court. (Such a holding would require a striking down of the statutory provi-

sion for an *ex parte* hearing, not a striking down of the provision establishing obscenity as a predicate offense.)

Petitioners have shown no logical or constitutional basis for holding that property used in or gained from a criminal activity (distributing obscene material) should be protected while other property derived from or used in criminal activities may be forfeited.

It is intended that RICO statutes have a chilling effect only on certain criminal activities including the distribution of obscene material. There has been no showing by the Petitioners that the RICO legislation is any more restrictive or chilling than Indiana's general obscenity statute.

The orders entered by Indiana courts under Indiana's RICO statutes are directed against property which allegedly has been used in or derived from a pattern of criminal activity. (The Petitioners have not been enjoined from any activity, and both are currently engaged in the business of selling books.) It is the criminal activities of the Petitioners or their employees which triggers the imposition of RICO sanctions against the property. The First Amendment does not protect the Petitioners from the consequences of participating in criminal activity.

The Indiana RICO statute should be upheld in its entirety.

Respectfully submitted,

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# APPENDIX A
# INDIANA CIVIL AND CRIMINAL RICO STATUTES

## CHAPTER 30.4
## CIVIL REMEDIES FOR RACKETEERING ACTIVITY

Sec. 1. As used in this chapter: "Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) Has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1.

Sec. 2. The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) Order a defendant to divest himself of any interest in any enterprise or real property;

(2) Impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) Order the dissolution or reorganization of any enterprise;

(4) Order the suspension or revocation of a license, permit or prior approval granted to any enterprise by any agency of the state;

(5) Order the forfeiture of the chapter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of

directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) Make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons.

Sec. 3. (a) The prosecuting attorney in a county in which any of the property is located may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-1. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violatio of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred.

Sec. 4. (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) The seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter.

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) Place the property under seal;

(2) Remove the property to a place designated by the court; or

(3) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to [replevin], but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 [34-4-30.5-3] of this chapter. If an action is not filed within one hundred eighty [180] days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner.

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable

damage to the aggrieved person is not require. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violtion of IC 35-45-6-2 to pay to the aggrieved person:

(1) An amount equal to three (3) times his actual damages;

(2) The costs of the action;

(3) A reasonable attorney's fee; and

(4) Any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section.

Sec. 6. In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2.

# CHAPTER 6
# RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
## (CRIMINAL RICO STATUTE)

Sec. 1. As used in this chapter:

"Documentary material" means any document, drawing, photogrph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) Sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) Union, association, or group, whether a legal entity or merely associated in fact.

"Pattery of racketeering activity" means engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five [5] years after a prior incident of racketeering activity.

"Racketeering activity" mean to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a class C felony (IC 35-42-2-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); offical misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tamper-

ing (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gamblins (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10).

Sec. 2. (a) A person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony.

## INDIANA CODE SECTION 35-49-2-1

## DEFINITION OF OBSCENE MATTER OR PERFORMANCE

Sec. 1. A matter of performance is obscene for purposes of this article if:

(1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;

(2) The matter or performance depicts or describes, in a patently offensive way, sexual conduct; and

(3) The matter of performance, taken as a whole, lacks serious literary, artistic, political, or scientific value. [IC 35-49-2-1, as added by P.L. 311-1983, 33.]

**Indiana Code Section 35-49-3-1.** A person who knowingly or intentionally:

(1) Sends or brings into Indiana obscene matter for sale or distribution; or

(2) Offers to distribute, distributes, or exhibits to another person obscene matter;

commits a class A misdemeanor. However, the offense is a class D felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age.

**Indiana Code Section 35-49-1-9** "Sexual conduct" means:

(1) Sexual intercourse or deviate sexual conduct;

(2) Exhibition of the uncovered genitals in the context of masturbation or other sexual activity;

(2) Exhibition of the uncovered genitals of a person under sixteen [16] years of age;

(4) Sado-masochistic abuse; or

(5) Sexual intercourse or deviate sexual conduct with an animal.

Supreme Court, U.S.
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No. 87-614

In The

# Supreme Court of the United States

October Term, 1987

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., and
FANTASY TWO, INC.,

*Petitioners,*

v.

STATE OF INDIANA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT

## REPLY BRIEF

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October Term, 1987

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., and
FANTASY TWO, INC., *Petitioners,*

v.

STATE OF INDIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT

## REPLY BRIEF

## ARGUMENT

### LIKE ANY OTHER OBSCENITY PROSECUTION, THIS CASE MUST BE REVIEWED UNDER THE FIRST AMENDMENT STANDARDS WHICH GOVERN ANY REGULATION OF UNPROTECTED SPEECH.

For several years, Ronald Sappenfield and the corporate petitioners have owned two adult bookstores in Howard County, Indiana. There is no evidence which indicates that prior to the 29th day of October, 1984, any questions regarding the propriety of any material which was offered for sale had been raised. There is no evidence

which indicates that Sappenfield had received any complaints from his customers or that he was chargeable with knowledge that any of the materials which he offered for sale were thought to be outside of the contemporary community standards of Howard County. However, based upon the purchase of six similar magazines on three separate occasions, the State of Indiana wishes to treat Sappenfield like a "mobster" who has repeatedly performed acts of murder, drug dealing, loan sharking, or theft and send him to prison for over twenty years. Indiana wishes to set in motion a chain of events which will result in the closure of his stores and the termination of his business with all of its communicative attributes. It is against this background that Indiana and the various amici contend there is no First Amendment impact. Such a contention is patently frivolous.

Using obscenity as a predicate offense, the federal RICO statute and those of Indiana and other states represent the most harshly punitive *anti-obscenity* measures ever enacted.[1] Solely for two or more obscenity violations, even if committed in a single day in the course of operating a business "enterprise" such as a bookstore or

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[1] The range of penalties for obscenity/RICO violations varies widely. The federal statute 18 U.S.C. § 1961 (1984) and those of New Jersey, N.J. Rev. Stat. § 2C: 41-1 (West Supp. 1982); Pennsylvania, Pa. Stat. Ann. tit. 18, § 911; and Delaware, Del. Code Ann. tit. 11, § 1502 (1986) provide for up to twenty years imprisonment. Florida's statute, Fla. Stat. Ann. § 895.02 (West 1983), carries up to thirty years incarceration. Fines and forfeitures generally follow as a matter of course.

video outlet or newsstand, a defendant could be sentenced to many years in prison. Due to the combined effects of RICO's extreme sanctions and the underlying obscenity statute's vagueness and minimal scienter requirements, this statute creates an inestimable and impermissible chilling effect upon the entire genre of erotic materials.

Under the applicable First Amendment standards of review, the chilling effect of such a draconian statute can not be denied. Indiana concedes as much although Indiana would characterize the chilling effect as "deterrence." (Respondent's Brief p. 8; Brief of United States p. 13). Indiana therefore does not address the merits of Sappenfield's challenge to the criminal RICO statute on chilling effect grounds. Rather, it seeks refuge in the twin premises erroneously adopted by the Indiana Supreme Court in *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987), that such a statute enjoys the presumption of constitutionality, and that the RICO Act as applied to obscenity does not implicate First Amendment values. Both of these assumptions are incorrect under firmly entrenched constitutional principles.

The applicability of First Amendment standards of review to this case is beyond reasonable dispute. Because it is virtually impossible to predict in advance what will be deemed obscene, the practical effect of this statute is to create a regime of self-censorship under which a great deal of protected expression inevitably will be suppressed. This Court has continually reaffirmed that in such cases implicating the free exercise of First Amendment rights, "the standard of review is determined by the nature of the right assertedly threatened or violated

rather than by the power being exercised or the specific limitation imposed." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

It is thus irrelevant that Indiana's announced purpose behind the RICO Act is to combat "racketeering." Where the statute is predicated solely upon *allegedly* unprotected speech, prescribes extraordinarily severe penalties for expressive conduct, and thus operates to curtail presumptively *protected* speech by its chilling effect, the First Amendment unquestionably applies as in the case of any other anti-obscenity or anti-defamation statute. In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), Chief Justice Burger noted that "where it was conduct with a significant expressive element that drew the legal remedy in the first place," the usual First Amendment scrutiny would apply. Resorting to "mere labels" such as "nuisance" or "racketeering" cannot confer "talismanic immunity" from the requirements of the First Amendment. *New York Times v. Sullivan*, 376 U.S. 254, 269, (1964).

This Court disposed of the argument the state advances in *Near v. Minnesota*, 283 U.S. 697 (1931), finding the label of "nuisance abatement" inadequate to justify censorship of a newspaper as a sanction for unprotected, defamatory speech. Likewise, characterizing a bookstore or theater as a "racketeering enterprise" exclusively because of two or more obscenity violations does not alter the constitutional ground rules which have always governed obscenity litigation.

This Court must not accept without critical analysis the state's characterization of the RICO Act as a content-

neutral campaign against "racketeering," but rather must subject the statute to searching and realistic scrutiny.

In complete disregard of these principles of First Amendment review, Indiana seeks to invoke the usual presumption that the law is constitutional. Because of the elevated rank of First Amendment rights in our hierarchy of constitutional values, however, a statute which so evidently threatens to chill vast amounts of protected expression does not enjoy the normal presumption of constitutionality. "Where a law is subject to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges does not have the same controlling force." *City of Los Angeles v. Preferred Communications*. 474 U.S. 1099, (1986).

The courts which have reviewed RICO/obscenity provisions under the appropriate First Amendment standards have declared them unconstitutional: e.g. *Goldsmith v. 4447 Corporation*, 479 N.E.2d 578 (Ind. Ct. App. 1985). Only by artificially and erroneously denying that the First Amendment applies at all to such drastic anti-obscenity legislation have the courts in *4447 Corporation, supra*, 504 N.E.2d 599 (Ind. 1987) and *United States v. Pryba*, 674 F. Supp. 1504 (E.D.Va 1987) upheld RICO/obscenity provisions. This Court is respectfully urged to avoid this patent error.

## THE SEVERE PENALTIES OF THE RICO/OBSCENITY ACT CREATE AN IMPERMISSIBLE CHILLING EFFECT WHICH RENDERS THE STATUTE INVALID UNDER THE FIRST AMENDMENT.

This Court has continually recognized that because First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society," they "need breathing space to survive." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). The very "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions," *id.*, creating "a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within [their] purview." *Thornhill v. Alabama*, 310 U.S. 88, 98, 60 S. Ct. 736, 742 (1940). *See also Hustler Magazine V. Falwell*, ___ U.S. ___, 108 S.Ct. 876, 880 (1988).

Integral to the Supreme Court's holding in *Roth v. United States*, 354 U.S. 476 (1957) that obscenity could be regulated as unprotected speech was the stipulation that such statutes must not infringe upon the untrammeled circulation of *protected* materials:

> [S]ex and obscenity are not synonymous . . . .The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

354 U.S. at 487.

As the Court recognized in *Roth, supra*, many Americans value sexually oriented materials as entertainment or as sources of information and, unless such materials

are obscene, they enjoy the full protection of the First Amendment. Because protected expression must not get caught up in the nets designed to snare obscenity, the power to regulate in this area must be strictly limited: "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary." *Id.* at 488.

The RICO/obscenity statute, because of its undue chilling effect, represents an inappropriate and unwarranted incursion through that door.[2] The RICO Act's dramatic breadth and its enhanced criminal penalties for obscenity offenses, when combined with the inherent vagueness of the obscenity definition and the closely related problem of scienter, can only serve to create an unprecedented regime of self-censorship. By making the dissemination of *any* sexually explicit materials an ultra-hazardous endeavor, the RICO statute casts a chilling pall guaranteed to compel First Amendment businesses such as bookstores, theaters, and video outlets to "steer far wider of the unlawful zone," a result the Court long ago condemned in *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

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[2] The United States, as amicus curiae, claims that the "chilling effect" argument was not addressed to the trial court. This claim is incorrect. The statute was challenged on the grounds that it violated the First Amendment (J.A. p. 150, paragraph 1). In the memorandum in support of his Motion to Dismiss, Sappenfield said: ". . . because the defendant has not been convicted of distribution of obscene matter, he submits that he cannot be constitutionally charged with racketeering. To allow this prosecution to continue will have a substantial 'chilling effect' upon the exercise of First Amendment rights." (J.A. p. 156).

The vagueness problem, which indisputably continues to plague obscenity litigation, is discussed in detail in Sappenfield's brief. With the advent of the "video revolution," X-rated videotapes of the type formerly regarded as "hard-core" have become standard viewing fare among American adults. Community standards, which have always been subject to criticism as vague and unascertainable, *Smith v. United States*, 431 U.S. 291 (1977), have become even less ascertainable. Given this situation in which the *Miller* guidelines have become increasingly amorphous, obscenity statutes not only fail to give the fair notice due process requires; they equally fail "to establish minimal guidelines to govern law enforcement," which this Court condemned strongly in *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

Regardless of whether one concludes that the vagueness of the *Miller* definition reaches an intolerable level, a defendant charged with an obscenity offense almost never has advance knowledge that the material is obscene and therefore illegal. It is extremely difficult, if not impossible, to predict what materials will be targeted for obscenity prosecution and subsequently adjudged to be obscene. Literary classics and major motion pictures have been subjected to obscenity prosecution "Carnal Knowledge" was deemed obscene at trial and by the Georgia Supreme Court until this Court reversed the decision in *Jenkins v. Georgia*, 418 U.S. 153 (1974). Household name magazines such as *Playboy* and *Penthouse*. available at most newsstands and convenience stores, are frequently threatened with obscenity prosecution. *See, e.g., Council for Periodical Distributors Association v. Evans,*

642 F.Supp. 552 (M.D. Ala. 1986). Such prosecutions abound in Indiana.

In Crawfordsville, Indiana, obscenity prosecutions have recently been lodged against David and Betty Pressler, owners of the Superette Convenience Store, for selling *Swank* magazine and "Erotic X-Film Guide Special," relatively tame sexual fare. (Appendix B). A similar prosecution has been lodged against Ken Heller, the owner of Bank Cigar Store, for selling an issue of the men's magazine, *"The Best of Club."* (Appendix C).

Presumably, the Presslers, Superette Convenience Store, Ken Heller, and Bank Cigar Store could be threatened with a RICO prosecution. Neither they, nor the distributors of the challenged magazines can afford to take such a risk and would be deterred from doing so. Deterrence in this context is the unconstitutional chilling effect which will drive all sexual material from the shelves.

In addition to vagueness, the closely related issue of scienter also factors into the calculus of chilling effect. Immediately following its decision in *Roth* that obscenity could be criminalized as unprotected speech, the Court in *Smith v. California*, 361 U.S. 147 (1959), confronted the issue of strict liability imposed upon a bookseller for possession of obscene material. The Court concluded this type of regulation would "work a substantial restriction on the freedom of speech and of the press" by its chilling effect. *Smith*, 361 U.S. at 150.

Like the ordinance struck down in *Smith, supra*, RICO statutes, authorizing substantial imprisonment for merely making two sales or exhibitions of materials ultimately

found to be unprotected with no requirement of advance knowledge of obscenity, make First Amendment businesses "the strictest censors of their merchandise," and have "such a tendency to inhibit constitutionally protected expression that [they] cannot stand under the Constitution." *Id.* at 152, 155.

Although this Court noted in *Mishkin v. New York*. 383 U.S. 502, 511 (1966), that "the Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity," the scienter requirement has been reduced to the vanishing point in practical application. *See Sherwin v. United States*, 572 F.2d 196, *cert. denied*, 437 U.S. 909 (1978) ("constructive knowledge" of material's contents sufficient scienter for obscenity conviction.) In the case of the distributor who desires to market a wide range of materials, the very low threshold of scienter *actually* required in obscenity prosecutions only exacerbates the "inherent ambiguities" of the obscenity definition and increases the peril for disseminating erotic materials. Unable to make a safe judgment that much popular erotic material would be immune from prosecution, the distributor or video store operator has little choice but to engage in self-censorship of precisely the sort this Court sought to preclude in *Smith v. California, supra*.

Indiana claims that the reach of RICO/obscenity is no greater than the reach of obscenity statutes. This is clearly incorrect. The experience of Burke Mendenhall, as expressed in his amicus brief in support of certiorari in *Ft. Wayne Books v. Indiana* (the companion case to this one), demonstrates the inaccuracy of this claim. Burke Mendenhall, a building owner with no interest

in a bookstore save collecting rent, was sued because of his "knowledge" of and "association" with a "racketeering enterprise", that is, a bookstore tenant which had not even opened for business. (J.A. p. 103). Despite the closure of the challenged bookstore, Mendenhall's building is padlocked against all future tenants and the State and respondent Goldsmith continue to seek forfeiture. If Mendenhall is "associated" with the "enterprise" for civil RICO purposes, he is "associated" for criminal RICO purposes. The clear effect of RICO/obscenity is to directly threaten both the bookseller and those who would lawfully aid the seller. Given the experience of Mendenhall, what responsible building owner can safely rent to a store openly selling *any* erotic material? The risk is simply too great![3]

Even assuming these vaguenesses, scienter and overbreadth problems do not create an unconstitutionally chilling effect in the context of garden variety misdemeanor obscenity prosecutions, the additional factor of criminal penalties including a major prison sentence for a RICO/obscenity violation certainly exceeds First Amendment limitations in its deterrence of protected expression.

In *New York v. Ferber*, 458 U.S. 747, 773 (1982) this Court recognized that a penalty imposed by a statute affecting speech may be relevant to a determination of the statute's constitutionality. The Court of Appeals for

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[3] Mendenhall was not the only landlord sued. The action was commenced against Ivan Chalfie and Henry Kahn, d/b/a Disk Development. The complaint alleges that these defendants were "associated" with the enterprise and participated "indirectly" through a pattern of "racketeering activity."

the 9th Circuit in *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir. 1987). has acknowledged that severe criminal penalties for RICO/obscenity might impermissibly chill First Amendment Rights. Although a limiting construction regarding Arizona's felony fine provisions made it unnecessary for the court in *Polykoff* to decide how high the fines would have to be to create a cognizable "chill," certainly a substantial prison term is a greater penalty than *any* fine.

As a practical matter, a statute compelling booksellers, their landlords, and others to guarantee the non-obscenity of all their wares, on pain of prison sentences and fines reserved for robbers, thieves, and kidnappers in Indiana[4] has an undoubted chilling effect. The resulting sentences coupled with forfeiture create a "pall of fear and timidity . . . in an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

Faced with the prospect of long-term imprisonment in addition to other RICO/obscenity sanctions, the failure to discern accurately "the dim and uncertain line" separating protected expression from obscenity, *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963), is fraught with extreme peril. Unavoidably, many booksellers, theaters, and video

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[4] The following crimes are class "C" felonies in Indiana and carry the same penalties as obscenity/RICO without the forfeiture sanctions: Arson (Ind. Code § 35-43-1-1); Assisting a Criminal (Ind. Code § 35-44-3-2); Confinement (Ind. Code § 35-42-3-3); Possession of Narcotics (Ind. Code § 35-48-4-6); Fraud on a Financial Institution (Ind. Code § 35-43-5-8); Robbery (Ind. Code § 35-42-5-1); Inflicting Serious Injury with a Deadly Weapon (Ind. Code § 35-42-2-2); and Theft of Over $100,000 (Ind. Code § 35-43-40-2).

store operators will decide to exclude from their wares most, if not all, sexually oriented materials, the protected along with the unprotected, for fear of erring in the extremely difficult judgment as to whether any given item might now or at some later time be prosecuted as obscene.

Indiana claims that:

> There is no showing . . . that a bookstore or chain of stores would be seized for selling *Penthouse* or even such sexually explicit material as Anais Nin's frankly acknowledged erotic writings titled *Delta of Venus*. Indeed, all these titles have been available to adults in Indiana without suppression by the State.

Respondent's brief p. 11.

Sappenfield submits that after the common enforcement of these statutes, these materials will not continue to be available in Indiana. The present prosecutions in Crawfordsville, Indiana demonstrate the serious mischief a single prosecutor can work. (Appendix B,C,D).

These prosecutions follow a pattern by which prosecutors bring actions against mainstream items in an effort to "clean up" or shape community standards.

In *Jenkins v. Georgia, supra,* this Court pronounced the motion picture "Carnal Knowledge" non-obscene only after the movie had been found obscene by a jury and the Georgia Supreme Court. Presumably, had the RICO/obscenity law been in effect in Georgia in 1974, the theater where Jenkins worked could have been threatened with forfeiture because the film was undoubtedly shown at least twice. Under these circumstances, only the bravest theater owner would have dared to show "Carnal

Knowledge." Indeed, a theater owner in Indiana, Ohio, or any other state, reading of a threatened prosecution in Georgia, would have been moved to decline to show "Carnal Knowledge."

Similarly, in *Penthouse International Limited v. McAuliffe,* 610 F.2d 1353 (5th Cir. 1980), the court of appeals found an issue of *Penthouse* magazine to be obscene. There have been other prosecutions of *Penthouse, e.g., State v. Walden Book Company,* 386 So.2d 342 (La. 1980). *See also Council for Periodical Distributors v. Evans, supra.*

In short, history assures us that prosecutors will seek to prosecute such items as *Penthouse* and *Playboy.* History assures us that an insensitive prosecutor may seek to prosecute *Delta of Venus.* More importantly, a prosecutor can drive *Delta of Venus* from the shelves merely by threatening *Penthouse.* There can be no question that these items are similar and there can be no question that these items may be equally threatened with prosecution. (See Appendix A.) No responsible store owner can risk prosecution when an error in judgment means a death sentence for the business *and* prison for the owner.

Under these circumstances, the local prosecutor would become the *de facto* arbiter of the availability of sexually explicit material in a community. He could, with a letter, drive out sexual material ranging from male sophisticate magazines (for example, *Penthouse* and *Playboy)* to *Delta of Venus* to X-rated videos. (See appendix D).

## THE RICO STATUTE, USING OBSCENITY AS A PREDICATE OFFENSE IS NOT A TRADITIONAL USE OF THE STATE'S POWER TO PROSECUTE CRIMINAL ACTIVITY.

Indiana and the United States contend that RICO/obscenity laws are within the state's traditional powers to prosecute obscenity and to deter crime. They further contend that RICO/obscenity laws are necessary to proper law enforcement. Each of these assertions is incorrect.

This Court has repeatedly held that state and federal laws regulating obscenity must be "carefully limited." *Miller v. California*, 413 U.S. 15, 23-24 (1973). *See also Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Respondents and their amici claim that since neither federal nor state RICO statutes have *in other contexts* required prior convictions, no such special safeguards are required in RICO/obscenity enforcement. Yet, RICO prosecutions based upon other predicates do not have the significant impact upon protected expression as the RICO/obscenity statutes. However RICO has been applied in civil or "traditional" criminal contexts, if it is to be applied in the context of obscenity, it must be governed by specific rules which insure the necessary sensitivity.

Indiana claims that obscenity regulation, including RICO/obscenity, is limited only by the use of the correct standard for determination of obscenity. This is incorrect. The Court has repeatedly held, in various contexts, that the procedures which are used to regulate obscenity are constitutionally mandated to insure "the necessary sensitivity to freedom of expression . . ." *Freedman v. Maryland*, 380 U.S. 51 at 59 (1965). *See also A Quantity of Books v.*

*Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). In each of these cases the Court has recognized procedural safeguards unique to obscenity prosecutions. The safeguards are required to ensure, as much as possible, that protected material will not be suppressed. Assuming that the RICO/obsenity statute is neither unacceptably vague nor overbroad, specific procedural safeguards such as those suggested by Sappenfield are necessary to avoid driving protected materials from the marketplace. The many subtle factors which establish "contemporary community standards" and the nuances in material which might make one work protected and another obscene require that a RICO prosecution not be allowed until the seller has demonstrated an unwillingness to comply with the law over a sustained period of time. To allow RICO/obscenity prosecutions based upon isolated errors in judgment is to require that distributors of explicit material *guarantee* that the material is not obscene. Such a requirement would strip society of its vitality and diversity by insuring that only the most sanitized material dealing with sex could be distributed. To require, *de facto*, such sexual pablum is to constrict the First Amendment in a manner which this Court has never before considered, much less allowed.

The RICO/obscenity combination is simply not such a "sensitive tool" that it falls within the state's traditional power to regulate obscenity. Moreover, the massive deterrence which respondents and amici claim is a RICO/obscenity strength is, in fact, the substantial chilling effect which Sappenfield have demonstrated inevitably

results from the statute's application. To call the wholesale removal of an entire class of protected materials "deterrence" is to misunderstand the fundamental protection which the First Amendment has traditionally conferred upon speech of all kinds. To call the chilling effect of the RICO/obscenity statute "deterrence" is to redefine the "sensitive tools" which this Court has traditionally required in statutes regulating speech.

Finally, respondents assert that there is a legitimate state interest which requires use of RICO/obscenity against individuals such as Sappenfield. Indiana characterizes this interest in terms of *Russello v. United States*, 464 U.S. 16 (1983), that is, new weapons against organized crime.

Implicit in this analysis is the proposition that present obscenity laws cannot or do not reach Sappenfield's conduct. There is no basis for Indiana to conclude that, if convicted of the underlying obscenity charges, Sappenfield will not attempt to bring materials offered for sale in line with the contemporary community standards of Howard County. Sappenfield has not demonstrated an unwillingness to comply with the law. Yet, by artificially renaming his obscenity charges racketeering, the state "ups the ante" so that Sappenfield faces twenty years of imprisonment and business extinction.

The host of other crimes allegedly committed by some *producers* of explicit material – prostitution, kidnapping, drug use, child pornography, rape, and indeed, murder – are all punishable by criminal statutes including RICO using offenses other than obscenity as predicates. That these offenses may have occurred in isolated instances in the past at the production level does not

justify using this statute against the ultimate seller of erotic materials. In short, Indiana, by calling anti-obscenity legislation "racketeering" and listing numerous accusations, many of which are unproven, hope to blind the Court to the profound impact of RICO/obscenity upon protected speech.

Indiana simply does not recognize that the First Amendment's protection makes the sale of a magazine, a book, or a movie different from the sale of narcotics. When one sells cocaine, he knows he is committing a crime. When one sells a book, magazine, or movie, he is acting lawfully. The act becomes unlawful only if, and when, a jury rules the work obscene. This difference, resulting from the protection of the First Amendment, creates a distinction separating obscenity offenses from all other crimes.

## CONCLUSION

It is ironic that at a time when sexually explicit materials, especially video tapes, are enjoying unprecedented popularity, a highly politicized campaign exists to drive all such materials from the marketplace.[5] RICO/

[5] In conjunction with the activities of the Attorney General's Commission on Pornography, a letter was sent to various chains of stores threatening to label them "pornographers" because they offered for sale certain male sophisticate magazines. The publishers were forced to seek injunctive relief to prevent political pressure from driving them from retail outlets. *Playboy Enterprises Inc. v. Edwin Meese III, Attorney General*, 639 F.Supp. 581 (U.S.D.C. Dist. Col. 1986). As the letter contained in appendix 4 demonstrates, such pressure is not confined to the Attorney General of the United States.

obscenity statutes, with harsh prison sentences, potentially huge fines, and forfeiture will have that effect. No responsible businessman can be aware of the sentence and forfeitures imposed in *United States v. Pryba, supra*[6] or of what happened to Burke Mendenhall and risk selling erotic material. No responsible book or video store nor its landlord can risk offending the local prosecutor when, with but a few hours' work, the prosecutor can close the store and seize the building which houses it. The impact of RICO/obscenity is not merely "deterrence;" it is the creation of a group of supercensors – not courts, not jurys, not the market – but rather, the various county, state, and federal prosecutors who can control what material is available with a letter. Sappenfield urges the Court not to allow such a class of supercensors to emerge but rather to strike down the RICO/obscenity statute.

Respectfully submitted,

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[6] The order of forfeiture in *Pryba*, (Appendix B, Brief of Ft. Wayne Books) forfeited property having a value of hundreds of thousands of dollars based upon the sale of less than $200.00 of sexually explicit material. Certain individual defendants received executed prison sentences.

# APPENDIX A

## Skinny-Dipping Campers Take Plunge in Hot Gals' Love Canals

Excerpted from *Letters, Crowd Scenes, Penthouse Letters,* June 1988, Vol. 6, No. 6, p. 9, ©1988 by Penthouse Letters Ltd.

I have been an avid fan of *Penthouse Letters* for many years, and I have always envied the experiences that I have read about. Finally, however, I had an experience worth writing about.

I recently went camping for a weekend with two friends, Roger and David, at Fall Creek Falls State Park here in central Tennessee, a few hours from Nashville. We spent Saturday morning hiking around on the day trails and soon found them too crowded for our liking. So we decided to strike out on our own. We left the crowds gathered at the base of the falls and followed the creek downstream over rugged rocks for quite a ways. The rough going had us hot and sweaty, and we soon reached a spot that we thought would be isolated enough to strip naked and go for a swim.

The water was extremely refreshing, and in fact was so cold that it shrank our vital parts! We frolicked for a while, feeling primitive and natural, when we heard noises coming from the woods along the shore. I looked up to see three lovely young ladies tromping along in full backpacking gear. Needless to say, we were more than a bit embarrassed, and I rather expected them to be frightened and leave. Much to my surprise, however, the one in the lead flashed us a big smile and said, "Hi!" I managed to mumble something in response, and another of the girls said, "Mind if we join you?" We all grew excited at

the thought of seeing those supple forms naked and splashing in the water. I watched admiringly as they slipped off their packs and got out of their clothes. They plunged into the chilly river, the cold making their nipples stand up and salute.

After a bit of good natured romping together, the cold of the water got to be too much, and I climbed up on a rock with Melanie, the one who had spoken first, to catch some sun and warm up. No sooner were we there than she took a look at my shriveled schlong and said, "Aw, did the cold water shrink your pecker? I'll bet I can make it get big." With that she took my withered organ into her mouth and within moments had it standing proud at its full nine inches. From somewhere behind me, I heard one of the other girls tell Dave, "I want to suck your big fat cock," and out in the middle of the river Roger had found a warm place to put his pulsating manhood. Melanie's long brown hair tickled my stomach as her head bobbed up and down on my engorged member. I reached out to fondle her gorgeous breasts. From behind I heard Kim moaning, and twisted around enough to see her engaged in a furious 69 with David.

Melanie's skillful sucking had brought me to the brink of an explosive orgasm, and she, sensing this, stopped and squeezed the tip, saying, "Got to save something for me!" Out in the shallow water Roger and Jan were going at it so hard I thought their splashing would empty the river. I turned Melanie around and began licking her quivering quim, and soon I had her shuddering in a violent orgasm. She then rolled over and said, "Your prick is so beautiful. Fill me up with your fat cock." She mounted me and began rocking up and down,

back and forth. Soon I couldn't hold off any longer. I thought my whole body would explode as I shot my wad in her wet cunt.

Exhausted, we turned around to catch the show behind us. We were just in time to see Dave shoot a hot load of come into Kim's mouth. She smiled sweetly as she swallowed, licking her chin to catch a dribble and then going back down on him to finish off every last bit. "Mmm, that's good," she said as he gently stroked her voluptuous tits. She began to fondle his peter and soon had him hard again, whereupon he mounted her and began pumping. By this time Jan had had enough of the cold water, and Melanie was so hot from our session that she wanted to cool off again; so Roger and I traded partners. Jan's wet, sensuous body glistened in the sun as she approached me, smiling. "He's a tough act to follow, but you look to me like you can measure up, she said as she began stroking my flaccid penis.

We fucked for what seemed like hours, during which Jan must have climaxed a dozen times, and finally I came even more earthshakingly than before. David and Kim had rejoined Roger and Melanie in the water, and after catching our breath, Jan and I did so as well. We were soon cooled off. We got out of the water, dried off and got dressed. We invited the girls to come by our campsite later on for some wine, and they said they might drop in. After good-bye kisses all around, they were off into the woods again. We never saw them again, but they gave us something we will remember the rest of our lives!--*F.W., Nashville, Tenn.*

## The Boarding School

By Anais Nin

Excerpted from *The Delta of Venus: Erotica* by Anais Nin, ©1969 by Anais Nin, ©1977 by The Anais Nin Trust, 1986 Harvest/Harcourt Brace Jovanovich.

This is a story of life in Brazil many years ago, far from the city, where the customs of strict Catholicism still prevailed. Boys of good birth were sent to boarding schools run by the Jesuits, who continued the severe habits of the Middle Ages. The boys slept on beds of wood, rose at dawn, attended mass without breakfast, confessed every day and were constantly watched and spied upon. The atmosphere was austere and inhibiting. The priests ate their meals apart and created an aura of sainthood around themselves. They were stylized in their gestures and speech.

Among them was a very dark-skinned Jesuit who had some Indian blood, the face of a satyr, large ears glued to his head, piercing eyes, a loose-lipped mouth that was always watering, thick hair and the smell of an animal. Under his long brown robe the boys had often noticed a bulge which the younger boys could not explain and which older boys laughed at behind his back. This bulge would appear unexpectedly at any hour–while the class read *Don Quixote* or Rabelais, or sometimes while he merely watched the boys, and one boy in particular, the only fair-haired one in all the school, with the eyes and skin of a girl.

He liked to get this boy off by himself and show him books from his private collection. These contained reproductions of Inca pottery on which there were often depictions of men standing against each other. The boy would ask questions which the old priest had to answer elusively. Other times the prints were quite clear; a long member came out of the middle of one man and penetrated the other from behind.

At confession this priest plied the boys with questions. The more innocent they appeared to be, the closer he questioned them in the darkness of the little confessional box. The kneeling boys were unable to see the priest, who was sitting inside. His low voice came through a small grilled window, asking, "Have you ever had sensual fantasies? Have you thought about women? Have you tried to imagine a woman naked? How do you behave at night in bed? Have you ever touched yourself? Have you ever fondled yourself? What do you do in the morning upon rising? Do you have an erection? Have you ever tried to look at other boys while they dress? Or at the bath?"

The boy who did not know anything would soon learn what was expected of him and be tutored by these questions. The boy who knew took pleasure in confessing in detail his emotions and dreams. One boy dreamed every night. He did not know what a woman looked like, how she was made. But he had seen the Indians making love to the vicuña, which resembled a delicate deer. And he dreamed about making love to vicuñas and awakened all wet every morning. The old priest encouraged these confessions. He listened with endless patience. He imposed strange punishments. A boy who masturbated

continuously was ordered to go into the Chapel with him when no one was around, dip his penis in the holy water, and thus be purified. This ceremony was carried out in great secrecy at night.

There was one very wild boy who looked like a little Moorish prince, black-faced, with noble features, a royal carriage, and a beautiful body so smooth that no bones ever showed, lean and polished as a statue. This boy rebelled against the customary wearing of nightgowns. He was used to sleeping naked and the nightgown choked him, stifled him. So every night he put it on like the other boys, and then he would secretly take it off under his covers and finally fall asleep without it.

Every night the old Jesuit would make his rounds, watching that no boy visited another in his bed, or masturbated, or talked in the dark to his neighbor. When he reached the bed of the undisciplined one, he would slowly and cautiously lift the cover and look at his naked body. If the boy awakened he would scold him. "I came to see if you were sleeping without a nightgown again!" But if the boy did not awaken he was content with a long lingering glance at the youthful body asleep.

Once during anatomy class when he stood on the teacher's platform, and the girlish blond boy sat staring at him, the prominence under his priest's robe became obvious to everyone.

He asked the blond boy, "How many bones does man have in his body?"

The blond boy answered meekly, "Two hundred and eight."

Another boy's voice came from the back of the classroom, "But Father Dobo has two hundred and nine!"

It was soon after this incident that the boys were taken on a botanical excursion. Ten of them lost their way. Among them was the delicate blond boy. They found themselves in a forest, far from the teachers and the rest of the school. They sat down to rest and decide upon a course of action. They began eating berries. How it began, no one knew, but after a while the blond boy was thrown on the grass, undressed, turned on his stomach, and the other nine boys all passed over him, taking him as they would a prostitute, brutally. The experienced boys penetrated his anus to satisfy their desire, while the less experienced used friction between the legs of the boy, whose skin was as tender as a woman's. They spat on their hands and rubbed saliva over their penises. The blond boy screamed and kicked and wept, but they all held him and used him until they were satiated.

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## APPENDIX B

THE STATE OF INDIANA )
) SS:
COUNTY OF MONTGOMERY )

IN THE MONTGOMERY CIRCUIT COURT

1988 TERM

| | |
|---|---|
| STATE OF INDIANA | INDICTMENT FOR: |
| VS | DISTRIBUTION OF OBSCENE MATTER |
| DAVID PRESSLOR<br>BETTY PRESSLOR | I.C. 35-49-3-1(2)<br>Class A Misdemeanor<br>(Filed June 28, 1988) |

THE GRAND JURY of the County of Montgomery, State of Indiana, upon their oath or affirmation do present that David Presslor and Betty Presslor on the 9th day of November, 1987, at the County of Montgomery, in the State of Indiana; did offer to distribute, distribute, exhibit to Candy Woodall obscene matter, to-wit: magazines titled; "The Hottest Porn Stars"; "Swank"; "Exotic X-Film Guide Special." All of which is contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

A TRUE BILL

/s/ Thomas F. Brinkfield
Foreman, Grand Jury
/s/ Martin A. Pruitt
/s/ Mary J. Cripe
/s/ Judy A. Goss
/s/ Mariann A. Sarver

/s/ Wayne Steele
Wayne E. Steele
Prosecutor
22nd Judicial Circuit
State of Indiana

Filed and recorded in open Court this 28th day of June, 1988.

/s/ Kim Servies for
Rebecca Neideffer
REBECCA NEIDEFFER
Clerk, Montgomery Circuit Court

## APPENDIX C

STATE OF INDIANA )
) SS:
COUNTY OF MONTGOMERY )

IN THE MONTGOMERY CIRCUIT COURT

1988 TEAM

| | |
|---|---|
| STATE OF INDIANA | INDICTMENT FOR: |
| VS | DISTRIBUTION OF OBSCENE MATTER |
| KEN HELLER | I.C. 35-49-3-1(2)<br>Class A Misdemeanor<br>(Filed June 28, 1988) |

THE GRAND JURY of the County of Montgomery, State of Indiana, upon their oath or affirmation do present that Ken Heller on the 9th day of November, 1987, at the County of Montgomery, in the State of Indiana; did offer to distribute, distribute, exhibit to Candy Woodall obscene matter, to-wit: a magazine titled; "The Best of Club International". All of which is contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

A TRUE BILL

/s/ Thomas F. Brinkfield
Foreman, Grand Jury
/s/ Martin A. Pruitt
/s/ Mary J. Cripe
/s/ Judy A. Goss
/s/ Mariann A. Sarver

/s/ Wayne Steele
WAYNE E. STEELE
Prosecutor
22nd Judicial Circuit
State of Indiana

Filed and recorded in open Court this 28th day of June, 1988.

/s/ Kim Servies for
Rebecca Neideffer
REBECCA NEIDEFFER
Clerk, Montgomery Circuit Court

APPENDIX D

Office Of
WAYNE E. STEELE
PROSECUTING ATTORNEY
(SEAL) 22nd Judicial Circuit
Montgomery County Courthouse
Crawfordsville, Indiana 47933
317-362-3242

June 3, 1987

TO: Bookstore Owners and Manager, Magazine Retail Dealers, Owners and Managers, and Video Rental and Retail Outlet Owners and Managers.

FROM: Wayne E. Steele, Prosecuting Attorney, Montgomery County, Indiana

To Whom It may Concern:

As you may know from press releases and radio newscasts, the Montgomery County Prosecutor's Task Force on Obscenity has jus completed its study of obscenity, and, more particularly, the availability of obscene materials in Montgomery County, Indiana. One of the surprising elements of the report of this task force was the information they provided this office regarding the amount of matter available in Montgomery County, which by statutory definition, and the standards considered by the task force, would be considered obscene. Such information, of course, is of deep concern to this office.

I am attaching for your information copies of the pertinent statutes under which prosecution for the distribution of obscene materials would be undertaken. I would like to call your attention to the provisions of I.C.

35-49-2-1. In judging matter that would be subject to prosecution under this chapter, considerable weight is to be given to the nature of contemporary community standards. I have been persuaded by the Task Force's Report that the community standards' test would apply, at least, to the following. (1) Matter which depicts, portrays, illustrates, or describes sexual conduct as defined under I.C. 35-49-1-9 and is offered for sale or rental, would be in violation of contemporary community standards in Montgomery County, Indiana. (2) Matter - for sale or rental - which depicts, portrays, describes or illustrates sadomasochistic abuse as defined under I.C. 35-49-1-8 would be in violation of contemporary community standards in Montgomery County, Indiana. (3) Matter which depicts, describes, or illustrates sexual excitement as defined under I.C. 35-49-1-10, and which is offered for sale or rental, would be in violation of contemporary community standards in Montgomery County, Indiana. (4) Ay matter which singly or collectively appeals to prurient interest in sex and which is touched upon by the prohibitions of these and other statutes would be in violation of contemporary community standards in Montgomery County, Indiana.

For your futher information, I would call you attention to I.C. 35-49-2-1, and point out that matter which has as its dominant theme an appeal to the prurient interest in sex, or which portrays, depicts, illustrates, or describes in a patently offensive manner sexual conduct, and which lacks serious literary, artistic, political, or scientific value would be a legitimate basis for prosecutorial action.

In addition, I want to call your attention to the provisions of I.C. 35-49-3-3 which provide for independent prosecutorial action for displaying such matter as discussed in this letter or indicated in the attached statutes, in a manner that makes them accessible to minors.

In regard to this I call your attention further to the provisions of I.C. 35-49-2-2 which provides for an independent standard of judgment and proof to be applied when dealing with matter made accessible to minors for the purpose of viewing, browsing, purchasing or renting.

Now that I have the Task Force's report to assist me in gauging community standards, and because I am obliged to enforce the statutes of the State of Indiana, I feel that merchants should be given the opportunity to consider these findings and the actions which the statutes compel. I hope that this letter will assist you in understanding the basis for future action that may be taken by the Prosecutor's Office.

If you have any questions on these matters, please do not hesitate to contact my office.

Sincerely yours,

/s/ Wayne Steele
Wayne E. Steele
Prosecuting Attorney
Montgomery County, Indiana

WES/sm

Supreme Court, U.S.
FILED
JUL 7 1988
CLERK

No. 87-614

# In the Supreme Court of the United States

OCTOBER TERM, 1988

RONALD W. SAPPENFIELD, ET AL., PETITIONERS

*v.*

STATE OF INDIANA

*ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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*Department of Justice*
*Washington, D.C. 20530*
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## QUESTION PRESENTED

Whether the Indiana Racketeer Influenced and Corrupt Organizations Act, Ind. Code §§ 35-45-6-1 *et seq.*, may constitutionally incorporate state obscenity crimes as predicate acts.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

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No. 87-614

RONALD W. SAPPENFIELD, ET AL., PETITIONERS

*v.*

STATE OF INDIANA

---

*ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT**

---

## INTEREST OF THE UNITED STATES

This case presents the question whether the Indiana RICO statute, Ind. Code §§ 35-45-6-1 *et seq.*, may constitutionally incorporate state obscenity crimes as predicate acts. The substantive provisions of the Indiana RICO statute are patterned after the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. (& Supp. IV) 1961-1968 (federal RICO statute). See *4447 Corp.* v. *Goldsmith*, 504 N.E.2d 559, 564 (Ind. 1987), cert. granted *sub nom. Fort Wayne Books, Inc.* v. *Indiana*, No. 87-470 (Mar. 7, 1988). The federal RICO statute also incorporates certain obscenity crimes as predicate acts, to wit: (1) "any act or threat * * * dealing in obscene matter * * * which is chargeable under State law and punishable by imprisonment for more than one year;" and (2) "any act which is indictable under * * * sections [18 U.S.C.] 1461-1465 (relating to obscene matter)." 18

U.S.C. (& Supp. IV) 1961(1). The outcome of this case may therefore determine the constitutionality of using obscenity crimes as predicate acts in the federal RICO statute.

## STATEMENT

1. The Indiana RICO statute prohibits a person "[w]ho is employed by or associated with an enterprise" from "knowingly or intentionally conduct[ing] or otherwise participat[ing] in the activities of that enterprise through a pattern of racketeering activity * * *." Ind. Code § 35-45-6-2(3). The phrase "pattern of racketeering activity" is defined in the statute to mean engaging in at least two related "incidents of racketeering activity." To engage in an incident of "racketeering activity" means "to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of one of a number of enumerated state criminal statutes, including "a violation of IC 35-49-3." *Id.* § 35-45-6-1. Section 35-49-3-1 makes it unlawful, inter alia, to distribute obscene matter.[1]

The distribution of obscene material in violation of Section 35-49-3-1 is a Class A misdemeanor, punishable by a term of imprisonment of not more than one year and a fine of not more than $5,000. Ind. Code §§ 35-49-3-1, 35-50-3-2.[2] A person convicted of an Indiana RICO viola-

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[1] Section 35-49-3 also prohibits certain activities relating to obscene performances (Ind. Code § 35-49-3-2) and the distribution of obscene material to minors (*id.* § 35-49-3-3).

[2] If the material in question "depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age" (Ind. Code § 35-49-3-2), the offense is a Class D felony punishable by a term of imprisonment for between one and four years and a fine of not more than $10,000 (*id.* § 35-50-2-7).

tion is guilty of corrupt business influence, a Class C felony punishable by two to eight years' imprisonment and a fine of not more than $10,000. *Id.* §§ 35-45-6-2, 35-50-2-6. Indiana also has separate civil forfeiture provisions permitting the prosecuting attorney in a county in which the property is located to bring an action for the forfeiture of any property "used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of" the Indiana RICO statute. *Id.* § 34-4-30.5-3(a). A prior criminal prosecution is not a prerequisite to a civil forfeiture proceeding, but if there has been such a prosecution, "the principle of collateral estoppel operates to bar relitigation of the issues previously determined in [the] criminal proceeding" (*id.* § 34-4-30.5-6).[3]

2. As part of an investigation of adult bookstores in Howard County, Indiana, officers of the local sheriff's department bought several magazines at each of two stores allegedly owned and operated by petitioner Ronald Sappenfield and his former wife (J.A. 176-177). The magazines contained photographs depicting heterosexual and homosexual activity (J.A. 138-149, 177). Sappenfield was subsequently charged with six counts of distributing obscene matter, in violation of Ind. Code § 35-49-3-1, and with two counts of corrupt business influence, in violation of the Indiana RICO statute (J.A. 138-149).[4] Petitioners

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[3] Upon filing a civil forfeiture action, the prosecutor "may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of [the Indiana RICO statute] involving the property in question has occurred." Ind. Code § 34-4-30.5-3(b). The constitutionality of such a pretrial seizure, in the context of an obscenity case, is at issue in *Fort Wayne Books, Inc.* v. *Indiana, supra.*

[4] Sappenfield's former wife was charged with the same offenses, but the State later moved to dismiss the charges against her (see J.A. 136).

Fantasy One, Inc., and Fantasy Two, Inc. were each charged with three counts of distributing obscene matter and one count of corrupt business influence (*ibid.*).

Petitioners have not yet been tried on either the obscenity counts or the Indiana RICO counts (J.A. 177). Indiana has not seized any books, magazines, or other materials from petitioners, and no forfeiture actions have been brought against them.

3. Petitioners moved to dismiss the two RICO counts on numerous grounds (J.A. 150-167). The trial court granted the motion, holding that the Indiana RICO statute, as applied to obscenity predicates, is "unconstitutionally vague and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States" (J.A. 175). The court reasoned that because the First Amendment creates a "presumption" that "printed matters, movies and publications * * * are legitimate," there must be "a judicial determination, in an adversary proceeding" that the materials in question are obscene before a seller of such materials can be prosecuted under the Indiana RICO statute (J.A. 174). The court concluded that the phrase "two incidents of racketeering activity" was unconstitutionally vague because it could mean "merely distributing or selling written material which has not been determined by a judicial proceeding to be unlawful" (*ibid.*).

4. The Court of Appeals of Indiana reversed the order of dismissal and reinstated the charges (J.A. 176-181). The court noted that the Supreme Court of Indiana in *4447 Corp.* v. *Goldsmith, supra,* had already concluded that because " '[o]bscenity does not come within the area of constitutionally protected speech or press * * * the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated

predicate offenses which have no conceivable First Amendment ramifications.'" J.A. 180 (quoting 504 N.E.2d at 564). The court of appeals also noted (J.A. 180) that the Supreme Court of Indiana had expressly concluded in that case (504 N.E.2d at 566) that prior convictions for predicate obscenity offenses are not required in order to prove a pattern of racketeering activity under the Indiana RICO statute. In light of that decision, the court concluded (J.A. 180), "Indiana's RICO statute is not unconstitutional as applied to the State's obscenity statute." The Supreme Court of Indiana denied review (J.A. 183).

## SUMMARY OF ARGUMENT

The initial premise of each of petitioners' arguments is that the Indiana RICO statute must be subjected to heightened First Amendment scrutiny insofar as it incorporates state obscenity crimes as predicate acts. That premise is wrong. This Court has long recognized that obscenity is not protected under the First Amendment. *Roth* v. *United States,* 354 U.S. 476, 485 (1957). Provided that the predicate obscenity statute itself passes constitutional muster, the incorporation of obscenity offenses in the Indiana RICO statute does not raise any additional First Amendment concerns. States are free to enact obscenity laws and to impose criminal penalties for violations of those laws. The Indiana RICO statute affects only the penalty attached to the crime, not the type of expression proscribed, and, within Eighth Amendment limitations, it is up to the legislature to determine the appropriate penalty for a criminal offense.

In *Miller* v. *California,* 413 U.S. 15, 27 (1973), this Court developed a strict test for obscenity in order to "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." As long

as Indiana's obscenity statute defines obscenity according to the *Miller* criteria, the statute is neither vague nor overbroad. The prohibition against obscenity does not become vague or overbroad simply by being incorporated as a predicate act in another criminal statute. To obtain a conviction under the Indiana RICO statute, the government must prove beyond a reasonable doubt each essential element of the state obscenity law. It follows that the "potential reach" (Pet. Br. 28) of the Indiana RICO statute cannot extend beyond the reach of the underlying predicate offense, the scope of which has been "carefully limited" by this Court (*Miller* v. *California*, 413 U.S. at 24).

Both this Court and the Indiana Supreme Court have held that the predicate offenses that are used to establish a "pattern of racketeering" in a RICO prosecution need not have been the subject of prior convictions. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 488 (1985); *4447 Corp.* v. *Goldsmith*, 504 N.E.2d at 566. The Constitution requires no different rule when the predicate acts are obscenity crimes. The strict definition of obscenity and the scienter requirements applicable to all obscenity prosecutions will ensure that dealers have ample notice that their conduct may result in a RICO prosecution. Nor is a pretrial judicial determination as to the obscenity of the materials at issue constitutionally required. The obscenity of particular materials, like any other question of fact in a criminal trial, is for the jury to decide. In the absence of a pretrial seizure of, or other restraints placed on, allegedly obscene materials, there is no constitutional requirement of a pretrial adversarial hearing to establish the obscenity of the materials charged in the predicate acts.

## ARGUMENT

### THE INDIANA RICO STATUTE MAY CONSTITUTIONALLY INCORPORATE STATE OBSCENITY CRIMES AS PREDICATE ACTS

1. Petitioners contend (Br. 24) that "[b]y using obscenity or obscenity related offenses as predicates, the Indiana RICO law becomes impermissibly vague and overbroad." The real target of petitioners' attack, however, is not the Indiana RICO statute, but the Indiana obscenity statute that is incorporated by reference into the Indiana RICO statute. Petitioners claim (Br. 24-25) that "the legal test of obscenity" established by this Court in *Miller* v. *California, supra*, a test carefully tracked by the Indiana obscenity statute (see Ind. Code § 35-49-2-1), "is notably inexact" and, indeed, "so amorphous that the line between communications which are protected and those which are not is often too blurred to identify criminal conduct."

The short answer to petitioners' contention is that neither the correctness of this Court's decision in *Miller* nor the constitutionality of Indiana's obscenity statute is at issue in this case. Those questions were not " 'pressed or passed upon' below." *Clark* v. *Jeter*, No. 87-5565 (June 6, 1988), slip op. 3 (quoting *Bankers Life & Casualty Co.* v. *Crenshaw*, No. 85-1765 (May 16, 1988), slip op. 7).[5] Nor were they presented in the petition for a writ of certiorari to this Court, and the interlocutory posture of this case would make their resolution premature in any event. Thus, even if there is a "need for reexamination of *Miller*"

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[5] Petitioners did not move to dismiss the individual counts charging them with distributing obscene matter. They moved to dismiss only the two RICO counts, and they moved to dismiss those counts based only on alleged vagueness in the RICO statute itself, not based on any alleged vagueness in the underlying Indiana obscenity statute. See J.A. 150-151, 161-167.

(*Pope* v. *Illinois*, No. 85-1973 (May 4, 1987), slip op. 2 (Scalia, J., concurring)), this case is not an appropriate vehicle for that reconsideration.

The question on which this Court granted certiorari is whether the Indiana RICO statute creates any special constitutional problems insofar as it incorporates obscenity as a predicate offense. Petitioners provide no reason to believe that it does. This Court has long recognized that obscenity is not protected under the First Amendment. *Roth* v. *United States*, 354 U.S. at 485. For that reason, the distribution of obscene material is properly subject to criminal penalties through such enforcement tools as the State sees fit to employ. As long as the predicate obscenity statute defines the proscribed material with sufficient precision, incorporation of that statute in another criminal statute raises no additional constitutional concerns.

In *Miller* v. *California*, 413 U.S. at 23, this Court "acknowledge[d] * * * the inherent dangers of undertaking to regulate any form of expression." But the Court dealt with those dangers by "carefully limit[ing]" the scope of state statutes designed to regulate obscene materials (*id.* at 23-24). The Court developed a narrow test for obscenity, formulating "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment" (*id.* at 29).[6] The Court concluded that "these

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[6] The Court in *Miller* adopted a three-part definition of obscenity (413 U.S. at 24): (1) the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; (2) the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and (3) the work taken as a whole lacks serious literary, artistic, political, or scientific value. See also *Pope* v. *Illinois*, No. 85-1975 (May 4, 1987), slip op. 2-3.

specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution" (*id.* at 27). " 'That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.' " *Roth*, 354 U.S. at 491-492 (quoting *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947)).

The Indiana obscenity statute does not become vague or overbroad by being incorporated as a predicate act under the Indiana RICO statute. As with other predicate crimes, the Indiana RICO statute fully incorporates the state obscenity law. Ind. Code § 35-45-6-1. Thus, to prosecute successfully a violation of the Indiana RICO statute, the government must prove beyond a reasonable doubt each essential element of the state obscenity law. *4447 Corp.* v. *Goldsmith*, 504 N.E.2d at 566; cf. *United States* v. *Turkette*, 452 U.S. 576, 583 (1981); *United States* v. *Levasseur*, No. 88-1198 (1st Cir. May 9, 1988), slip op. 21. If the underlying obscenity statute passes constitutional muster, so does the Indiana RICO statute that incorporates it by reference.[7]

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[7] Petitioners mischaracterize (Br. 28-29 (emphasis in original)) the Indiana RICO statute when they assert that a RICO violation occurs whenever anyone "[k]nowingly *or* intentionally receives proceeds, directly *or indirectly* from a violation of 35-49-3 (obscenity) and who buys real estate or owns or operates a business." The actual language of the Indiana RICO statute clearly requires proof of a pattern of racketeering evidenced by the commission of at least two predicate acts. Ind. Code § 35-45-6-1. No one can be convicted of a violation of the Indiana RICO statute based on the distribution of obscene materials without also being guilty of at least two counts of distribution of obscene materials in violation of Section 35-49-3. *4447 Corp.* v. *Goldsmith*, 504 N.E.2d at 566. Thus, petitioners' speculation (Br. 32) that the telephone company or the water company could be

The Indiana RICO statute cannot reach any conduct that is not also constitutionally reached by the underlying obscenity statute. Indeed, the RICO statute has a narrower scope because, in addition to the underlying obscenity violations, the government must also prove that the predicate acts formed a "pattern of racketeering," that petitioners were "employed by or associated with an enterprise," and that petitioners "knowingly or intentionally conduct[ed] or otherwise participate[d] in the activities of that enterprise through a pattern of racketeering activity." Ind. Code § 35-45-6-2. Federal courts have consistently held that federal RICO provisions similar to those in the Indiana RICO statute are not overly vague. See, *e.g.*, *United States* v. *Tripp*, 782 F.2d 38, 42 (6th Cir.) (listing cases), cert. denied, 475 U.S. 1128 (1986); *United States* v. *Morelli*, 643 F.2d 402, 412 (6th Cir.) (listing cases), cert. denied, 453 U.S. 912 (1981). Petitioners offer no arguments to the contrary. Nor do petitioners explain how such additional elements of proof can render the Indiana RICO statute overly broad as applied to obscenity

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convicted of a RICO violation for providing services to an adult bookstore is wholly unfounded. The "potential reach" (Pet. Br. 28) of the Indiana RICO statute cannot extend beyond the reach of the underlying predicate offenses.

Petitioners contend (Br. 30-33) that the Indiana Supreme Court has diluted the scienter requirement and thus has unconstitutionally expanded the reach of the state obscenity statute beyond the confines set by this Court in *Miller* v. *California*. That issue, however, is not presented in the interlocutory posture of this case. We take no position on the validity of Indiana's obscenity laws or any alleged judicial "gloss" (Pet. Br. 25) placed on those laws by the Indiana Supreme Court. If the scope of Indiana's obscenity laws is overbroad, they may be struck down or limited in an appropriate case. But that question has no bearing on the more general question whether a RICO statute may incorporate a properly defined obscenity crime as a predicate act.

predicates. As long as the underlying state statute defines obscenity according to the test in *Miller*, no First Amendment interests are affected, and the obscenity statute should be treated no differently from other predicate criminal offenses that are incorporated in the Indiana RICO statute.[8]

2. Petitioners contend (Br. 12) that the "draconian sanctions" of the Indiana RICO statute will have a chilling effect on protected speech, in violation of the First Amendment. This argument was not raised by petitioners in their motion to dismiss (see J.A. 150-151),[9] and it was not passed on by either of the courts below. Nor was it listed in the questions presented to this Court for review (see Pet. i). Accordingly, this Court would not ordinarily reach the question. See, *e.g.*, *Clark* v. *Jeter*, slip op. 3; *Bankers Life & Casualty Co.* v. *Crenshaw*, slip op. 5-8. In any event, the argument is without merit.

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[8] An overbreadth challenge only can succeed if the statute in question "make[s] unlawful a substantial amount of constitutionally protected conduct" (*City of Houston* v. *Hill*, No. 86-243 (June 15, 1987), slip op. 7). As long as the definition of obscenity in the underlying statute is not overly broad, the RICO statute that incorporates that definition does not reach constitutionally protected conduct. Under such circumstances, a facial challenge to the RICO statute is inappropriate. As this Court noted in *Miller* v. *California*, 413 U.S. at 25: "If a state law that regulates obscene material is [limited according to the *Miller* standards] * * *, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

[9] In their memorandum of law in support of their motion to dismiss (J.A. 151-167), petitioners did complain (J.A. 156) of the "chilling effect" of the Indiana RICO statute as applied to obscenity offenses. That argument, however, was made only in the context of their contention that the statute was unconstitutionally vague. Petitioners did not challenge or even mention the penalties provided for a violation of the law.

States are free to enact obscenity laws and to impose a variety of criminal penalties and other remedies for violations of those laws. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57 (1973); *Roth* v. *United States*, 354 U.S. at 485-487; *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957). As this Court has explained, if a state "chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, * * * it is not for [the Court] to gainsay [a state's] selection of remedies." *Kingsley Books, Inc.* v. *Brown*, 354 U.S. at 441. There is no constitutional principle—based on the First Amendment or otherwise—that prohibits a state legislature from providing enhanced penalties for repeated violations of an obscenity law or for violations that are part of a pattern of racketeering. The stiffer penalties affect only the level of the crime and not the type of expression proscribed.[10]

We do not suggest that no chilling will occur as a result of the punishment provisions of the Indiana RICO statute. But unlike the chill that results from restraints on protected speech, see, *e.g.*, *NAACP* v. *Alabama*, 377 U.S. 288, 307-308 (1964); *Thornhill* v. *Alabama*, 310 U.S. 88,

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[10] Unlike the Indiana RICO statute, the federal RICO statute does not prescribe any minimum penalty. One who violates the federal RICO statute "shall be fined not more than $25,000 or imprisoned not more than twenty years." 18 U.S.C. (& Supp. IV) 1963. The maximum fine level has recently been increased to not more than $250,000 for an individual and not more than $500,000 for an organization. 18 U.S.C. (Supp. IV) 3571(b)(1)(A) and (2)(A). Also, while the Indiana RICO statute permits misdemeanor obscenity statutes to define predicate crimes, the federal RICO statute incorporates only felony obscenity statutes as predicate acts. 18 U.S.C. (& Supp. IV) 1961(1). Neither feature of the Indiana RICO statute, however, poses any constitutional difficulty. "It is not for this Court * * * to limit the State in resorting to various weapons in the armory of the law." *Kingsley Books, Inc.* v. *Brown*, 354 U.S. at 441.

98 (1940), the chill that arises from a predicate obscenity statute is a wholly legitimate consequence of the criminal penalties. Deterrence through the threat of prosecution and punishment for constitutionally unprotected activities is a proper goal of the state legislature. As a district court recently noted in the course of rejecting a similar attack on the federal RICO statute:

> Deterrence (or chilling) through the threat of prosecution and punishment is a legitimate goal of the criminal law. Once it is decided that obscenity does not merit First Amendment protection and indeed, once it is decided that obscenity is so pernicious that it should be criminally proscribed, then a subsequent punishment, like RICO's forfeiture scheme, is a sensible and wholly legitimate law enforcement weapon. It is specially designed to chill or deter proscribed, unprotected speech; unconstitutional chilling occurs only if the definition of obscenity is excessively broad or vague so that some protected speech is unintentionally ensnared in the imprecise net that is cast.

*United States* v. *Pryba,* 674 F. Supp. 1504, 1512-1513 (E.D. Va. 1987) (footnote omitted).

It is true, as petitioners contend (Br. 18), that a cautious bookseller might engage in self-censorship in light of the increased penalties and remove from his shelves some materials that are protected under the First Amendment. "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." *Smith* v. *California,* 361 U.S. 147, 154-155 (1959). But this Court has tolerated some degree of voluntary self-censorship as a consequence of state efforts to control hard-core pornography. The Court has sought to limit such voluntary

censorship by strictly defining obscenity and by ensuring that every obscenity statute requires proof that the defendant knew of the contents, character, and nature of the materials. *Hamling* v. *United States,* 418 U.S. 87, 123 (1974); *Mishkin* v. *New York,* 383 U.S. 502, 511 (1966). Provided that a state obscenity statute meets these requirements, the state may fairly impose significant penalties for materials found to be obscene. See, *e.g.*, *Roth* v. *United States,* 354 U.S. at 479 n.1 (upholding federal obscenity law with penalties of up to five years' imprisonment and a $5,000 fine); *Ginzburg* v. *United States,* 383 U.S. 463, 464 n.2 (1966) (same).[11]

In addition to the "harsh prison sentences" provided by the Indiana RICO statute, petitioners attack (Br. 17) the "pre- and post-indictment seizure of assets [and] post-conviction forfeiture" contemplated by "[t]he challenged statute." Petitioners, however, have been charged only with a criminal RICO violation. No civil forfeiture proceedings have been brought against them and none of their assets have been seized or otherwise restrained. The civil forfeiture proceedings at issue in *Fort Wayne Books, Inc.* v. *Indiana, supra,* have no bearing on the constitutionality

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[11] In *New York* v. *Ferber,* 458 U.S. 747, 773 (1982), this Court noted that "the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial." The Court emphasized (*ibid.*), however, that "the fact that a criminal prohibition is involved does not * * * *a priori* warrant a finding of substantial overbreadth." If an obscenity statute is properly defined, its "legitimate reach dwarfs its arguably impermissible applications" (*ibid.*), and the alleged severity of the criminal sanctions does not render it overbroad. "To be sure, RICO's sanctions are severe, but severity alone does not cause unconstitutional chilling or convert these sanctions into prior restraints." *United States* v. *Pryba,* 674 F. Supp. at 1518 (footnote omitted).

of the criminal penalites (fine and imprisonment) that are imposed by the Indiana RICO statute.[12]

3. Petitioners contend (Br. 33-37) that, even if the Indiana RICO statute's incorporation of obscenity crimes as predicate acts is not unconstitutional on its face, certain "specific safeguards" must be read into the statute "to ensure that the requisite sensitivity exists to render the statute constitutional" (Br. 33). Petitioners argue (Br. 34), first, that the predicate obscenity offenses must "be in the form of prior, properly obtained convictions where the second offense occurs after the first conviction and where a third 'RICO triggering act' occurs after the second conviction." Petitioners further claim (Br. 36) that they have a right to a "prompt judicial determination of probable obscenity in an adversary proceeding." Neither claim has merit.

---

[12] Among the penalties for a criminal conviction, the federal RICO statute provides for the forfeiture of assets used in or derived from a violation of the Act. 18 U.S.C. (& Supp. IV) 1963(a). Prior to trial, the United States may seek "a restraining order or injunction, * * * the execution of a performance bond, or * * * any other action to preserve the availability of [the] property" in question. 18 U.S.C. (Supp. IV) 1963(d). As a policy matter, however, the United States does not seek to seize or otherwise restrain books, films, or other bookstore assets prior to conviction in a federal RICO case involving predicate obscenity statutes. See, *e.g.*, *United States* v. *Pryba*, 674 F. Supp. at 1508 n.16. Since *Fort Wayne Books, Inc.* v. *Indiana*, *supra*, involves only the propriety of a pretrial seizure of assets and since the instant case does not involve any seizure of assets whatsoever, we do not understand either case to raise a question concerning the constitutionality of a post-conviction forfeiture of assets used in or derived from the sale of obscene materials.

a. The Indiana Supreme Court has already concluded that prior convictions for predicate obscenity offenses are not statutorily required to prove a pattern of racketeering activity under Indiana law. *4447 Corp.* v. *Goldsmith,* 504 N.E.2d at 566. Nor does the Constitution impose such a requirement. This Court has held that prior convictions are not required in a civil case brought under the federal RICO statute, *Sedima, S.P.R.L.* v. *Imrex Co.,* 473 U.S. at 488. In the course of its discussion, the Court dismissed as "nonsens[e]" the implication of the contrary position that "a prior conviction would also be a prerequisite * * * for a criminal prosecution" (*ibid.*).

No special rules are mandated when obscenity crimes are the predicate acts. This Court has never required a State to fire warning shots, in the form of misdemeanor prosecutions, before it may bring felony charges for distributing obscene materials. The strict scienter requirements applicable to obscenity prosecutions, see *Hamling* v. *United States, supra,* will ensure that the dealer has actual knowledge of the contents, character, and nature of the materials in question. And the "specific prerequisites" for hard-core pornography that are outlined in *Miller* v. *California,* 413 U.S. at 27, "will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

b. Indiana law requires that within ten days after allegedly obscene material is seized or purchased or a defendant is arrested for obscenity violations, "the defendant, an owner, or any other party in interest of any matter seized or purchased may apply for and obtain a prompt adversary hearing * * * [at which] the court shall make a preliminary determination of whether the matter is * * * [p]robably obscene [or] [p]robably harmful to minors." Ind. Code § 35-49-2-4. The record indicates, however,

that petitioners never applied for such a hearing. See J.A. 135-137 (docket entries). They cannot, therefore, be heard now to complain that they did not receive the hearing they never sought.

Furthermore, such a pretrial judicial determination as to the obscenity of the materials at issue is not constitutionally required. Obscenity, like any other essential question of fact in a criminal trial, is for the jury to decide. *Pope* v. *Illinois*, slip op. 2-3; *Smith* v. *United States*, 431 U.S. 291, 300-308 (1977). No pretrial screenings are necessary in ordinary obscenity prosecutions, and there is no reason why the rule should be different simply because the obscenity violation appears as a predicate act in another statute.[13]

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[13] A prompt adversarial determination of obscenity may well be required where allegedly obscene materials are seized or otherwise restrained prior to trial. See *Heller* v. *New York*, 413 U.S. 483, 488-493 (1973). But in contrast to *Fort Wayne Books, Inc.* v. *Indiana*, *supra*, no materials have been seized in this case, and no distribution of materials or other bookstore activities have been restricted. The mere purchase of materials from the bookstore for use as evidence in a subsequent prosecution cannot, in any sense, be considered a "seizure" of those materials. See *Maryland* v. *Macon*, 472 U.S. 463, 469-470 (1985).

## CONCLUSION

The judgment of the Court of Appeals of Indiana should be affirmed.

Respectfully submitted.

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In the

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October Term, 1987

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and

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vs.

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*Respondent.*

**ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT**

## MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

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## STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International

Periodical Distributors Association, Inc. (collectively referred to as *amici*), hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached joint brief, *amici curiae*, in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc. Attorneys for petitioners consented thereto; the consent of the attorney for respondents was requested but refused.

## The Amici

The *amici's* members publish, produce, distribute, and sell books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 4,000 members consisting of over 6,000 retail outlets. The members include private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, uni-

versities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for almost four hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

## Interest of the Amici

The interest of *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the legal principles involved in these two cases impact upon those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions,[1]

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[1] The Indiana RICO statute is modeled after the Federal RICO statute (18 U.S.C. § 1961 *et seq.*) and is similar to the RICO statutes of many other states.

are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." Such a harsh possible result obviously chills the exercise of First Amendment rights by the legitimate booksellers, distributors and publishers who are the members of *amici*.

This concern of legitimate businesses is not unwarranted. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of

no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney General's Commission on Pornography, *Final Report*, 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides as effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in the community.

Unless the Court reaffirms the existing doctrine relating to prior restraints, and continues to insist on adequate procedural safeguards where seizures of presumptively First Amendment protected materials are involved, RICO statutes like the Indiana law in these cases will surely chill the production and distribution of a wide range of First Amendment protected materials.

*Amici* filed an *amicus* brief in *Fort Wayne Books, Inc. v. Indiana* in support of the petition for certiorari, their

motion to file same having been granted. 108 S. Ct. 1106 (1988).

In view of the foregoing, *amici* seek leave to file the attached brief.

Respectfully submitted,

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RONALD W. SAPPENFIELD,
FANTASY ONE, INC., AND
FANTASY TWO, INC.,

*Petitioners,*

vs.

STATE OF INDIANA,

*Respondent.*

## BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

## STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International Periodical Distributors Association, Inc. (collectively re-

ferred to as *amici*), submit this joint brief, *amici curiae*, Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy in support of the petitioners, Fort Wayne Books, Inc., Two, Inc., having submitted a motion for permission to file same.

## Interest of the Amici and Summary of Argument

The interest of the *amici* reflects their continuing interest in the decisions of this Court balancing First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the RICO penalties at issue in these two cases create an unconstitutional prior restraint on First Amendment protected materials, and will have a chilling effect on the activities of those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions, are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." The threat of such a death penalty on one's business obviously chills the exercise of First Amendment rights by booksellers, distributors and publishers who are not themselves dealers in obscene ma-

terials. Cautious booksellers would avoid any publication which treads too close to the obscenity or "harmful to minors" threshold for fear of triggering draconian RICO penalties.

The concern of legitimate businesses that these RICO statutes will be used to curtail protected speech and publishing activities is hardly speculative. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography (the "Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" boycotts, picketing, and other "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney

General's Commission on Pornography, *Final Report* at 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene or "harmful to minors" and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which offends a vocal minority within a community.

*Amici* contend that the Indiana RICO statute and similar statutes violate the First Amendment in that they constitute an unconstitutional prior restraint on First Amendment protected materials under the doctrine first defined in *Near v. Minnesota*, 283 U.S. 697 (1931), that the statutes will have a chilling effect on First Amendment protected expression, and, further, that the statutes do not include the special protections that the Court has consistently imposed with respect to the seizure of presumptively First Amendment protected material.

## The Challenged Statute

The Indiana RICO statute was enacted in 1980, and is similar to the federal RICO statute, 18 U.S.C. § 1961 *et seq.* Basically, the statute provides that anyone who

acquires, maintains, or participates in any business through a "pattern of racketeering activity" is guilty of "corrupt business influence," a Class C felony. Ind. Code § 35-45-6-2. A pattern of racketeering activity is in turn defined as commission in the course of five years of two related offenses from a list of specified offenses. Ind. Code § 35-45-6-1. As interpreted by the Indiana Supreme Court, conviction for the offenses is not required. *4447 Corporation v. Goldsmith*, 504 N.E.2d 559, 566 (Ind. 1987). The list of offenses includes all Indiana obscenity law crimes. These crimes include not only importation or sale of obscene matter (Ind. Code § 35-49-3-1), but also disseminating to minors matter harmful to minors, displaying matter harmfal to minors in an area to which minors have visual, auditory or physical access, or displaying for sale matter harmful to minors within 500 feet of a church or school. (Ind. Code § 35-49-3-3). In addition to the criminal penalty, the State may invoke the full panoply of civil sanctions contained in Indiana Code Sections 34-4-30.5-1 through 30.5-4.

The civil remedies available for a violation of the Indiana RICO law are severe. They include forfeiture of any proper., derived from or used in the course of the RICO violation. Ind. Code § 34-4-30.5-3. Property may even be seized for forfeiture, and placed under seal or removed, by an officer on ex parte court order up to 180 days prior to the filing of any formal adversary forfeiture action. Ind. Code § 34-4-30.5-4. In the cases *sub judice* the entire contents of several bookstores were seized, without even an *ex parte* review of most of the material, which included First Amendment protected materials. In

fact, the Indiana Supreme Court stated it to be "irrelevant" whether the assets seized and forfeited were obscene or not. 504 N.E.2d at 565. In addition, the Court may, on the bringing of an action to enjoin a violation, issue an injunction "prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of" the RICO law. Ind. Code § 34-4-30.5-2(2).

An injunction will be granted on a showing by a preponderance of the evidence that a RICO violation has occurred. Similarly, property may be civilly forfeited on a showing by a preponderance of the evidence that the property was derived from or used in the course of a RICO violation. Thus, massive forfeitures of property and injunctions against engaging in similar businesses in the future may be effected even without a criminal conviction for the triggering violations, which, if it were required, would require proof beyond a reasonable doubt. As described by the Indiana intermediate appellate court, the RICO statute permits "seizure orders of indefinite duration and create[s] a remedy of permanent forfeiture which would extend the protected materials and neutral instrumentalities." *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 590 n. 8 (Ind. Ct. App. 1985).

## ARGUMENT

### I

### THE INDIANA RICO STATUTE CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT WHEN APPLIED BASED ON PREDICATE OFFENSES RELATING TO PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIAL.

The Indiana RICO statute provides for pre-judgment seizure and subsequent forfeiture of "any property used in the course of, intended for use in the course of, derived from, or realized through" a RICO violation. Ind. Code §§ 34-4-30.5-3 and 30.5-4. The overwhelming majority of books in a typical bookstore are not obscene, and most could not be deemed harmful to minors. Nevertheless, if over a five year period a store twice sold books judged by a particular community to be obscene, or sold to two minors books deemed harmful to those minors, or even, under the Indiana law, merely displayed two books harmful to minors in an area accessible to minors, the entire inventory of the store and all of its assets would be subject to forfeiture.[2] The store would thus be prevented from distributing the protected materials which at all times constituted an overwhelming portion of its business. The intent and obvious effect of this forfeiture provision (as demonstrated by its enforcement in this case and its companion cases below) is to cause a forfeiture of the entire business enterprise through which the violation was com-

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[2] It may, in fact, subject the assets of an entire chain of stores to seizure and forfeiture. In a recent federal RICO indictment brought in the Eastern District of Virginia, forfeiture of a chain of video stores was sought. *United States v. Prybta*, 674 F. Supp. 1504 (E.D. Va. 1987).

mitted, and thereby prevent the individuals involved from continuing in the same general line of business. Ind. Code § 34-4-30.5-2(2) lends further support to this construction, since it expressly authorizes a court to issue an injunction prohibiting a defendant from engaging in a similar business.

When the predicate offense relates to sexually explicit materials and when the business is a bookstore, chain of stores, distributor of written materials, or publisher, these RICO penalties clearly constitute a prior restraint violative of the First Amendment. The Court has consistently stated that "[a]ny system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan,* 372 U.S., at 70; *New York Times Co. v. United States,* 403 U.S., at 714; *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne,* 393 U.S. 175, 181 (1968); *Near v. Minnesota ex rel. Olson,* 283 U.S., at 716. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. See *Speiser v. Randall,* 357 U.S. 513 (1958)." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-559 (1975) (quoted with ap-

proval in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n. 13 (1980)).

The prior restraint imposed in these two cases and generally permitted under the Indiana and other similar RICO statutes is virtually identical to that struck down by the Court over 50 years ago in *Near v. Minnesota*, 283 U.S. 697 (1931). The statute in *Near* authorized enjoining a person who published an obscene or defamatory periodical from further publication of the periodical. Consistently since *Near* it has been clear that one cannot be punished for speech by the prohibition of future speech. *See, e.g., City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S. Ct. 316 (1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980).

Notwithstanding *Near* and its progeny, the Supreme Court of Indiana swept aside prior restraint concerns by reasoning that the RICO statute's forfeiture remedy

> "is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene."

*4447 Corporation v. Goldsmith*, 504 N.E.2d at 565 (Ind. 1987).

This Court, however, has made clear that the question of whether a statute operates a prior restraint must be determined not through such formal anaylsis but through a realistic inquiry into the actual effects of the

statute on protected expressive activity. As stated in *Near*, "in passing upon constitutional questions the court has regard to substance and not to mere matters of form . . . ; in accordance with familiar principles, the statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. at 708. As further stated in *Organization For A Better Austin v. Keefe*, a prior restraint exists where "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature. . . ." 402 U.S. at 418-419 (1971).

The plain effect of the forfeiture provision is to restrain future expression because of the content of prior expression. The court below avoided First Amendment analysis merely by recharacterizing the seized books and periodicals as "assets acquired through racketeering activity," indistinguishable from drugs, gambling equipment or other contraband. No such facile recharacterization can alter the fact that the statute's seizure and forfeiture provisions create the substantive harm that prior restraint doctrine aims to prevent—the repression of valuable expressive materials, which have not been adjudged obscene, as a consequence of prior speech. Labelling such expression as "racketeering" can no better strip away First Amendment protection than does labelling speech or speakers as "Nazi" (*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978)); "Communist" (*DeJonge v. Oregon*, 299 U.S. 353 (1937)); anti-semitic (*Near v. Minnesota, supra*); or "subordinators of women"

(*American Booksellers Ass'n, Inc. v. Hudnut*, 774 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)).[3]

The flaw in the Indiana RICO provisions is thus the same as in both *Near* and *Vance v. Universal Amusement Co.*, 445 U.S. at 311, fn. 3:

> In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books v. Sullivan* [cite omitted]. The separation of these forms of speech calls for "sensitive tools," *Speiser v. Randall* [cite omitted].

Such sensitivity is hardly shown by the statement of the court below that the separation between obscene and protected materials is "irrelevant."

While the RICO statute's forfeiture penalties clearly operate as an unconstitutional prior restraint when applied, perhaps more ominous and pervasive is the chilling effect which the mere threat of these draconian penalties will have on protected First Amendment activities. Booksellers, distributors and publishers will doubtless be inclined to avoid a provocative publication which may be viewed by

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[3] To the extent that crimes of violence or coercion are committed in the production of sexually-oriented material, state and federal laws, including RICO laws, provide ample opportunity for the prosecution of perpetrators. The only effect of adding the specific crime of dealing in obscenity to the list of predicate RICO offenses is to target RICO's harsh penalties at those who are criminals solely because the content of their speech is offensive. Hence, the ones prosecuted under the statute *sub judice* are not organized criminals or those who allegedly use kidnapping, violence, drugs, or coercion in the course of producing obscene material.

some as too close to the obscenity threshold when an error in judgment could lead to the forfeiture of one's business. The threat to First Amendment protections is always especially acute where questions of obscenity or "harmful to minors" are involved because "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books v. Sullivan*, 372 U.S. at 66 (1963). While the question of whether a chemical substance is an illegal drug may be determined objectively in any laboratory, the determination as to whether books or periodicals are obscene will vary from community to community, and from jury to jury, as each applies the standard of *Miller v. California*, 413 U.S. 15 (1973). The threshold of First Amendment protection becomes even dimmer and less certain when the "harmful to minors" standard of *Ginsberg v. New York*, 390 U.S. 629 (1968), is at issue, since such material by definition is First Amendment protected and has serious literary, artistic, political, or scientific value.[4]

Many familiar examples serve as reminders that books now recognized as literary classics were once banned as obscene under the standards of their day. If a RICO statute like the one involved in these cases had been widespread a few decades ago, booksellers might have had

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[4] That such "harmful to minors" statutes are subject to a multitude of widely divergent interpretations is well demonstrated by this Court's recent decision in *Virginia v. American Booksellers Association, Inc.*, 108 S. Ct. 636 (1988) (certifying to the Virginia Supreme Court the question of how such a statute should be interpreted). In the absence of a definitive state court interpretation of a "harmful to minors" statute, a bookseller could find his store padlocked after an *ex parte* RICO hearing merely because he had sold or displayed copies of a provocative bestseller to minors.

their doors padlocked merely for stocking the latest copies of works by Theodore Dreiser, D.H. Lawrence, or Edmund Wilson. *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930) (Dreiser's *An American Tragedy* held obscene); *Commonwealth v. Delacey*, 271 Mass. 327, 171 N.E. 455 (1930) (Lawrence's *Lady Chatterley's Lover* held obscene); *People v. Doubleday & Co.*, 272 App. Div. 799, 71 N.Y.S. 2d 736, *aff'd* 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd* 335 U.S. 848 (1948) (Wilson's *Memoirs of Hecate County* held obscene). Such cases as *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986) and *Council for Periodical Distributors Association v. Evans*, 642 F.Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987), show the real danger that a vocal minority in a community will use the RICO statutes to threaten the very business of any bookseller who deals in material which, though constitutionally protected, they deem objectionable. The burden will be particularly great on a regional or national book or periodical business which, by distributing material which might be considered obscene or harmful to minors in only two communities in the state, could potentially have its entire business seized.

## II

## THE INDIANA RICO STATUTE IS ALSO UNCONSTITUTIONAL BECAUSE IT LACKS ANY OF THE PROCEDURAL SAFEGUARDS REQUIRED WHEN PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIALS ARE SEIZED.

The Indiana RICO statute is also unconstitutional and should also be invalidated for failure to comply with the Court's prior rulings imposing procedural safeguards on

the seizure of presumptively First Amendment protected materials. Under the statute, property may be seized for forfeiture up to 180 days before any forfeiture action is even commenced. Ind. Code § 34-4-30.5-4. Furthermore, when the forfeiture proceeding is eventually filed, the statute imposes no fixed time limit for judicial resolution of the action, and does not even urge that resolution be prompt. In both of the cases under review, the trial courts' orders compelling the padlocking of bookstores and the seizure of all items within were issued after *ex parte* hearings, without notice to the booksellers or their attorneys. To this day, no trial date has been set in either case. This open-ended period of seizure, based on a mere probable cause showing, violates the requirement that "any restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965).

As stated in *Speiser v. Randall*, 357 U.S. at 525 (1958), the separation of obscene and protected speech requires "sensitive tools." State and federal RICO statutes are anything but sensitive tools, as evidenced by the statement of the Indiana Supreme Court that the obscenity or non-obscenity of the seized assets is irrelevant.[5] *4447 Cor-*

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[5] Even where First Amendment concerns are absent, the RICO penalty provisions have been severely criticized as crude and insensitive tools, lacking in various procedural safeguards. *See, e.g.*, Markus, *Procedural Implications of Forfeiture Under RICO, the CCE and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 Temple L. Q. 1097 (1986); Note, *Civil RICO Is A Misnomer: The Need for Criminal Procedural Protections In Actions Under 18 U.S.C. § 1964*, 100 Harvard L. Rev. 1288 (1987).

*poration v. Goldsmith*, 504 N.E.2d at 565. To permit the broadscale seizure and forfeiture of protected expressive materials by means of RICO statutes is to make a mockery of the constitutionally required procedural safeguards imposed to guard against prior restraint of materials presumptively protected by the First Amendment.

## CONCLUSION

As this Court has recently reiterated, "[f]reedoms of expression require 'breathing space.'" *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988) (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)). Moreover, the prior restraint doctrine is premised on the conviction that the circulation of offensive speech is a lesser cost than the unacceptable alternative of suppressing protected expression. As Madison said of the press: "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 571 (J. Elliott ed. 1866). Whatever the wisdom of pursuing the eradication of sexually explicit materials, attempts to eliminate them can only be undertaken after complying with First Amendment requirements of heightened sensitivity, and procedural safeguards so that provocative, unorthodox and even offensive ideas and modes of expression are not quashed.

For the reasons set forth above, we respectfully urge this Court to reverse the orders under review.

May 11, 1988

Respectfully submitted,

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(5) Nos. 87-470 and 87-614 (6)

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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FORT WAYNE BOOKS, INC.,

*Petitioner,*

v.

STATE OF INDIANA, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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RONALD W. SAPPENFIELD, ET AL.,

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

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## BRIEF OF MORALITY IN MEDIA, INC. AS *AMICUS CURIAE*

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Nos. 87-470 and 87-614

IN THE

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October Term, 1987

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Fort Wayne Books, Inc.,

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Ronald W. Sappenfield, Et Al.,

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State of Indiana,

Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

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# BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE

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## INTEREST OF AMICI

Morality In Media, Inc., as Amicus Curiae, files this brief in this case which is before this honorable Court on the merits, under the provisions of Rule 42(2). The written consents of the petitioners and respondents have been requested and all parties have consented in writing. Copies of these consents are being filed with this Court concurrently with this brief.

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states and Puerto Rico. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, 120 note 4 (1973) and in Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 58, notes 7 and 8 (1973).

More recently Morality In Media has participated as Amicus in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978); New York v. Ferber, 458 U. S. 747 (1982) and Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985).

Morality In Media is filing a brief in this matter because it believes that the decision in these cases will have a direct effect not only

on state RICO statutes but on the Federal RICO statute to which the crime of dealing in obscene matter was added in 1984 as a predicate crime at the request of Morality In Media. The recent case of United States v. Pryba, 674 F.Supp. at 1504 (E.D. Va. 1987) upheld the new federal obscenity RICO law.

It is the belief of Morality In Media that its brief contains arguments that will not be advanced by the parties.

## SUMMARY OF ARGUMENT

Morality In Media contends that the mere fact that the "enterprise" involves a so-called "First Amendment Business" which can under Indiana law be forfeited or dissolved does not invalidate RICO laws that include obscenity as a predicate offense. If this were not the law, then a criminal's so-called "First Amendment" business and corporation would be insulated from RICO laws entirely no matter what the predicate crime.[1] Morality In Media, Inc. contends that a sole proprietor of a "First Amendment" business can be incarcerated for long periods of time under existing Federal and State obscenity laws effectively precluding him or her from

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1. This honorable Court denied certiorari at 459 U.S. 825 (1982) to United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979) aff'd. 665 F.2d 616 (11th Cir. 1982) where the enterprise had as its purpose a "pornography business."

engaging in that First Amendment business.[2] Amicus further points out that the RICO laws are on the books not as a restraint on future First Amendment activity but as a form of punishment for engaging in a past "pattern" of racketeering activity.[3] Amicus further demonstrates that analogous decisions of this Honorable Court may be viewed as precedents for upholding the Indiana RICO statute. Finally Amicus demonstrates the inapplicability of Vance, Marcus, Books, Freedman and Heller.

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2. Cf., Arcara v. Cloud Books, Inc. 106 S. Ct. 3172, 3177 (1986) where this Court said "A thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed."

3. Cf., State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 at 628, (Idaho Sup. Ct. 1981) appeal dismissed pursuant to Rule 53, 455 U.S. 1009 (1982).

## ARGUMENT

### I

### THE INDIANA RICO LAWS DO NOT AMOUNT TO A PRIOR RESTAINT OF PROTECTED EXPRESSION ARE NOT OVERBROAD AND ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The issue of the legality of a "prior restraint" reached this honorable Court in the landmark case of Near v. Minnesota, 283 U.S. 697 707-708 (1931). On that issue that Court said:

> "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment.... In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of the sovereign power must always be determined with appropriate regard to the particular subject of its exercise.... Liberty of speech, and of the press, is also not an absolute right, and the State may punish its

abuse."

The Court continues at 283 U.S. 713:

"In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of tne guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone:

'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no <u>previous</u> restraints upon publication' (Emphasis Is The Court's) 'and <u>not in freedom from censure for criminal matter when published.</u>' (Emphasis Supplied). 'Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he

> publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.'"

The Near Court continuing at 283 U.S. 714, 715 quotes Patterson v. Colorado,[4]

> 'The main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications" as have been practiced by other governments" (Emphasis in Original) and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.' (Emphasis Supplied).

The Court continues at 283 U.S. 716;

> "The protection even as to previous restraint is not absolutely unlimited...the primary requirements of decency may be enforced against obscene publications." (Emphasis Added).

It is interesting to note that Justice

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4. 205 U.S. 454 at 462 (1907).

Butler, with whom Justices Van Devanter, McReynolds and Sutherland concur[5] states that the majority opinion;

> "Seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance."

It should be observed that the Indiana Rico law (34-4-30.5-2) permits the Court, after a defendant is found guilty of violating RICO, to:

(a) Require him to divest himself of any interest in the enterprise.
(b) Prohibit the defendant from engaging in the same type of endeavor.
(c) Dissolve or re-organize the enterprise.
(d) Order forfeiture of the charter.

Now none of these actions amount to a prior restraint, but are designed as punishment for

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5. 283 U.S. at 737.

past offenses. Contrary to the censorship decried in Near v. Minnesota there is no administrative or legislative[6] prior restraint upon any particular publication nor is there any particular subsequent restraint of any particular publication. What the Indiana law says is that "You, Mr. Defendant, (individual or corporation) may not engage further in this enterprise because you have prostituted it and turned it into a criminal activity." The statute, of course, as distinguished from the Near case situation, is "content neutral" relating to the predicate crimes which may trigger its remedies. It is not a statute that refers to the suppression of a newspaper or periodical, but "punishment in the ordinary sense" (cf., Near at 711 and 715). If we examine all of the Indiana civil RICO

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6. The dissenting Justices in Near argued that the doctrine of prior restraint, as it came to us from England and in the Blackstone quotation, supra, was restricted to Administrative prior restraint (283 U.S. 733).

remedies we find that in operation and effect no prior restraint is accomplished. The mere fact that the Defendant may be required to "divest" his interest or be "prohibited from engaging in the same type of endeavor" does not mean that one issue of a publication will be suppressed nor that the enterprise, if engaged in the distribution of publications, will miss a single sale. All that these provisions mean is that some one else may own the enterprise and the assets and the means of publication or distribution--not that the public will be deprived of access to the sentiments therein expressed, (even incidently if the subsequent issue published or distributed is obscene). The same outcome would prevail if the enterprise were reorganized. If it were dissolved, the assets would be sold and publication could continue. The same, of course, is also true if the extreme remedy of charter forfeiture were invoked. It is noted that the statute requires

that the rights of all innocent persons involved in any way in or with the "enterprise" be protected.

The RICO statute also provides for forfeiture of property to the state as a punishment for RICO violations. Again, it should be noted, that the intent of the statute appears to be that except for property that has no value that the assets seized be sold to another party--In such a case the so-called "First Amendment" business may continue,albeit with different <u>persons</u> at the helm. We judge this to be the intent of Section 34-4-30-5.-3 by reason of the language "The court...shall specify the manner of disposition of the property including the manner of disposition <u>if the property is not transferable for value</u>" (Emphasis Added).

It goes without saying that the Criminal RICO provisions under 35-45-6.2 do not exert a prior restraint. It is the typical "after the fact" punishment that this honorable Court has

traditionally held not to be a prior restraint. In summary, the Civil and Criminal Indiana RICO laws are designed to and have the effect of "punishing people" not "putting a business out of businesss" especially if it can be utilized for legitimate purposes. Of course, items found in the RICO case to be obscene become contraband subject to destruction, but all of the balance of the "First Amendment" material is presumed to be nonobscene as well as all projectors, publication, printing and distribution facilities and may be sold or transferred to new "owners."

It is also significant to note that Near v. Minnesota majority opinion, as interpreted by the dissenting justices, apparently excepted enjoining a nuisance from the concept of prior restraint— "The business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance"[7]," Near also puts on a

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7. Note 5, supra

par "enforcing concepts of decency against obscene publications" with the right of the government "to prevent actual obstruction of its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[8]

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8. 283 U.S. 716

II

WHERE SUFFICIENT REASON EXISTS THE CLOSURE OF A FIRST AMENDMENT BUSINESS HAS BEEN AUTHORIZED BY THIS HONORABLE COURT AND OTHER COURTS.

There is no legal principle established in law that prevents the closing of a so-called "First Amendment" business. The law does not surround such a business with an impregnable shield. The Fourteenth Amendment which provides that no state shall deprive any person of liberty without due process of law is not violated by a carefully tailored law designed to punish persons who abuse that liberty. As was said in Near v. Minnesota:

> "In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare is necessarily admitted." (283 U.S. 707) "It is recognized that punishment for the abuse of the liberty afforded to the press is essential to the protection of the public." (Emphasis added) (283 U.S. 715).

In Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177 (1986) this honorable Court stated:

> "We must reject the Court of Appeals' reasoning, analogizing the closure order sought in this case to an unconstitutional prior restraint under Near v. Minnesota.... The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another locat on even if such locations are difficult to find.[9] Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is

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9. The implication of this honorable Court here is that the First Amendment is not offended even if it takes a while to find a new location. This argues for sustaining the Indiana RICO statute even though the transfer of the business to a new owner through the process of dissolution, reorganization or sale after forfeiture takes some time. This action was taken over the objection of the dissenting judges to the effect that "The Court improperly attempts to shift to the bookseller the responsibility of finding an alternative site" (106 S.Ct. 3180).

> prohibited--indeed the imposition of the closure order has nothing to do with any expressive conduct at all."

There are similarities between Arcara and the cases at bar. Pending determination of the validity of the charges the defendants were free to carry on their adult book store activities at other locations especially if "new" money were utilized (except perhaps the fear that they might be arrested) but those arrests (either for obscenity or RICO violations) would not occur (or could be adequately defended) if the new locations avoided violating the law and in particular the Indiana Obscenity Law. The cases also fall squarely into the second Arcara test (which by itself is sufficient to rebut a claim of prior restraint) in that the seizure and forfeiture and the RICO statute are "content neutral" and the determination for seizure and forfeiture was not imposed "on the basis of an advance determination that the distribution of particular materials is

prohibited." As the Indiana Supreme Court said below; "It is irrelevant whether assets acquired through racketeering activity are obscene or not." (504 N.E.2d 564) (Emphasis Supplied).

We also draw the attention of the Court to Avenue Book Store v. City of Tallmadge[10] where this honorable Court denied certiorari to the Ohio Court of Appeals in 1981 over the stated objections of dissenting Justices. In that case, the Ohio Court of Appeals stated that:

> "Defendant is enjoined from utilizing the rear section of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene."

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10. 459 U.S. 997 (1982) . In Avenue Book the Ohio Court held that the injuction did not "carry with it any of the dangers of a censorship system." It said it did not constitute a prior restraint because" no punishment will be imposed until it is proven that obscene material was indeed involved." (459 U.S. at 997-998). (See also the outline of cases on both sides involving padlocking outlined in the Dissent in that case at 998-999).

Other cases involving First Amendment businesses where the state action was upheld include Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82 (1975) dismissing an appeal from the Ohio Supreme Court 307 N.E.2d 911 (1974) ruling that a one year theatre closure provision was valid. The United States Supreme Court dismissed the appeal "For want of a substantial federal question."[11]

Young v. American Mini Theatres,[12] held that zoning laws on adult entertainment businesses do not constitute impermissible prior restraints noting that there is "No claim that...the viewing public is unable to satisfy its appetite for sexually explicit fare. ...the market for this commodity is essentially unrestrained."

There are lower court cases that

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11. Under Hicks v. Miranda, 422 U.S. 332 (1975) such a dismissal is a ruling "On the Merits."

12. 427 U.S. 50, 62 (1976).

recognize that "padlocking" of a motion picture theater is not an invidious prior restraint. A leading case is State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 (Idaho Supreme Court 1981) (appeal dismissed under Rule 53) 455 U.S. 1009 (1982). The opinion of the Idaho Supreme Court in that case, in which a one year padlock was imposed, is especially enlightening and applicable. The Court said at 631 P.2d 626:

> "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. ...What is needed is a pragmatic assessment of its operation in particular circumstances.... Kingsley Books v. Brown, 354 U.S. at 441-42."

Continuing at 627:

> "By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior

> restraint on his bookselling activities. If that same bookseller is convicted of a crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it will have that effect" (Emphasis Added).[13]

The Idaho Court continues at 627:

> "There are a number of distinctions between the Near case and the previously cited hypothetical examples, not the least of which is the fact that Near dealt with speech critical of public officials rather than speech of a sexual nature. Most significantly, however, the Near

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13. The point here is that while in "operation and effect" the incarceration deprives the defendant of the ability to conduct a First Amendment business, it is, in "operation and effect" not a restraint of First Amendment activities. It is a restraint on the defendant's participation therein. This distinction is dispositive of the present case.

injunction against prospective publication was based on the content of such publication" (Emphasis Added). "In the case of tax sales and imprisonment for violation of criminal obscenity statutes, the incidental restraint on future expression is not based on the content of that expression" (Emphasis Added).

At page 627, footnote 8, the Idaho court (citing cases) states:

> "The typical prior restraint case deals with the government's effort to censor future expression based on its content."

It then, at page 628, goes on to say;

> "The one-year forfeiture provision of the Idaho moral nuisance statute avoids the particular noxious specter of content control. Like a tax sale, the forfeiture is directed strictly against property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize

> past distributions of illegal and unprotected obscenity. The legislature could just as easily have imposed a fine or other property-related penalty. Instead the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation."[14]

The Idaho Court, at page 628, then gives us the rationale for forfeiture statutes as follows:

> "The purpose of statutory forfeitures is obvious: to punish and to deter...forfeitures punish 'by imposing an economic penalty thereby rendering illegal behavior

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14. "The state's authority to impose property related sanctions in civil actions is well-established...the most prevalent example of this type of in rem activity can be found in statutes imposing forfeitures upon vehicles and vessels used to transport contraband drugs.... Forfeiture is not limited to property used in drug crimes, however,...federal and state statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." (631 P.2d 628) (Emphasis Supplied).

unprofitable'.... This is the manifest purpose of Idaho's one year closing provision; not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain. That is a permissible state objective, implemented by permissible means."

At page 629 the Idaho Court says:

"Our conclusion is based on the following: the extensive power of the state to impose a forfeiture on neutral and innocent property used in the commission of forbidden acts; the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at speech or publication, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials except those already determined to be obscene, at

> any other location, subject, of course, to further penal actions by the state should the defendants again violate laws regulating obscenity."

This plain and well-spoken rationale can be lifted wholesale and applied to the Indiana RICO law.

III

THE PROCEDURAL SAFEGUARDS OF FREEDMAN, OF HELLER, OF VANCE, OF MARCUS AND OF BOOKS DO NOT APPLY

As has been demonstrated, since there is no "prior restraint" of existing or future publications, then Freedman, Heller, Vance, Marcus and Books do not apply.[15]

There is no effort to censor existing or future expression based on its content.[16] As this honorable Court said "Every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities."[17] and "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at

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15. Freedman v. Maryland, 380 U.S. 51 (1965); Heller v. New York, 413 U.S. 483 (1973); Vance v. Universal Amusement Co., 445 U.S. 308 (1980); Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1968).

16. Cf., Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

17. Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177.

penalizing and terminating illegal use of premises."[18] If we substitute the word "enterprise" or "corporate charter" for premises in the above quotation we have, in essence, set forth the governmental justification for RICO statutes.

It should be observed that the mere fact that the enterprise has as its purpose a "pornography business" (presumed initially to be protected expression) does not mean that a RICO statute cannot be applied if that business were advanced "by means of a pattern of racketeering activity in which the defendants participated." Cf. (United States v. Thevis, 474 Fed. Supp. 134 at 140 (N.D. Ga. 1979) 665 F.2d 616, at 621, cert. denied, 459 U.S. 825 (1982). In particular "The indictment specified that both corporations were utilized to 'manufacture "peep show" machines, to sell sexually explicit literature and to distribute

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18. Id. at 3178.

'adult oriented films'" United States v. Thevis, 474 F. Supp. 117 at 126 (N.D. Ga. 1979).

Finally the significance of the Arcara case, as it applies to the petitioner's claims of violation of Vance, Marcus, Books and Freedman, can be gleaned from the vigorous dissent in Arcara when Justices Blackmun, Brennan and Marshall complain that

> "Until today, the Court has required States to confine any book banning to materials that are determined through constitutionally approved procedures, to be obscene. See Marcus...Freedman.... Until to-day, States could enjoin the future dissemination of adult fare as a nuisance only by 'adhering to more narrowly drawn procedures than is necessary for the abatement of ordinary nuisance' See Vance...." (106 S.Ct. 3180).

Amicus quotes the dissent (without agreeing with its sentiments or conclusions) but only to further indicate the inapplicability of Vance, Marcus and Freedman to the case at bar.

## CONCLUSION

For all of the above, the decisions of the Indiana Courts should be affirmed.

DATED: May 19, 1988.

Respectfully submitted,

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Supreme Court, U.S.
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Nos. 87-470 and 87-614

In The

# Supreme Court of the United States

October Term, 1987

No. 87-470

FORT WAYNE BOOKS, INC.,
*Petitioner,*

vs.

STATE OF INDIANA, et al.,
*Respondents.*

No. 87-614

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., and
FANTASY TWO, INC.,
*Petitioners,*

vs.

STATE OF INDIANA,
*Respondent.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT AND COURT OF APPEALS OF THE STATE OF INDIANA

## BRIEF AMICUS CURIAE OF TOM COLLINS, AS COUNTY ATTORNEY FOR THE COUNTY OF MARICOPA, STATE OF ARIZONA, IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE AMICUS CURIAE

Your amicus curiae is the Honorable Tom Collins, duly elected County Attorney for Maricopa County, Arizona. He is the chief law enforcement officer of the county, with criminal prosecution authority over felonies and misdemeanors. He also represents the county in all civil matters.

Arizona's organized crime and fraud statutes (RICO), A.R.S. § 13-2301, et. seq., as applied to obscenity offenses, was partially invalidated by the Arizona Court of Appeals in State v. Feld, 745 P.2d 146 (Ariz.App. 1987) cert. denied, ___ U.S. ___ 1988. Feld is presently pending in the Arizona Superior Court for further proceedings

under remaining obscenity and RICO indictments. The trial court, whose invalidation the Arizona Court of Appeals upheld, retains jurisdiction.

The Indiana RICO statute before this Court is substantially similar to the Arizona statute partially invalidated in Feld. If this Court holds that the Indiana RICO statute is constitutional (as it should), the Arizona courts retain jurisdiction over Feld to reconsider its federal constitutional ruling invalidating the Arizona statute.

## SUMMARY OF ARGUMENT

I. The Use Of RICO With Obscenity Offenses Is Supported By The Purpose of RICO And Passes Muster Under The United States Constitution.

II. The Purpose Of RICO Is Not To Restrain Protected Speech. Any Impact On Speech Is Incidental To Lawful Non-speech Related Enforcement.

III. First Amendment Interests Are Adequately Protected By Forcing The Prosecution To Prove The Predicate Offense Of Obscenity Before Defendants Can Be Convicted of Racketeering.

## LAW AND ARGUMENT

### I. THE USE OF RICO WITH OBSCENITY OFFENSES IS SUPPORTED BY THE PURPOSE OF RICO AND PASSES MUSTER UNDER THE U.S. CONSTITUTION.

Congress and various state legislatures have added obscenity to their RICO statutes in order to fulfill the goals of RICO -- fighting organized crime -- not as a device to suppress protected material or to chill protected speech.[1]

Several reports, including the California Attorney General's 1987

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[1] CONG.REC. § 433-458 (daily edition, Jan. 30, 1984) (statement of Sen. Helms). Senator Helms, in introducing the amendment that added "dealing in obscene matter" to the federal RICO statute, put into the record material showing the profits organized crime gains from the sale of illegal obscenity, and reiterated that RICO was intended to provide "a means of dealing with organized crime." Id. at § 433.

Report on Organized Crime in California and the Final Report of the Attorney General's Commission on Pornography, have concluded that organized crime is behind most of the production and distribution of illegal, obscene pornography. The California report estimated that nationwide revenues from pornography range from $7 billion to $10 billion annually, "and organized crime is believed to be connected to most of this money." Attorney General's Report on Organized Crime in California at 7 (1987). It also concluded that "pornography was a lucrative part of organized crime operations" in California in 1986. Id. The Attorney General's Commission on Pornography endorsed the FBI's 1978 findings that ". . .

organized crime involvement in pornography . . . is indeed significant, and there is an obvious national control directly, and indirectly, by organized crime figures of that industry in the United States. Few pornographers can operate in the United States independently without some involvement with organized crime. The huge profits gathered by organized crime in this area and redirected to other lucrative forms of crime, such as narcotics and investment in legitimate business enterprises, are certainly cause for national concern . . ." Final Report of the Attorney General's Commission on Pornography, at 1071. These conclusions were important factors in the decisions of Congress and the various states to amend their

RICO statutes by including obscenity as a predicate offense.

Indeed, this Court has recognized that the purpose of the federal RICO statute is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). Its provisions are to be construed liberally to bring about its remedial purposes. United States v. Turkette, 452 U.S. 576 (1981). One of the most important of those remedies is the forfeiture of assets. Russello, supra. To effectuate this same purpose, the Indiana RICO statute should be liberally construed to accomplish its remedial intent.

A. The purpose of RICO is not to restrain protected speech. Any impact on speech is incidental to lawful non-speech related enforcement activities.

The use of RICO statutes in obscenity proceedings does not unconstitutionally restrain speech. Defendants may continue to sell or exhibit non-obscene material as long as they do not use the proceeds, instrumentalities, or property of past criminal activities.

The reasoning of Petitioners in the instant case, put into practice, would lead to absurd results. Under those arguments if a premises is used to sell narcotics or forged documents, but also sells magazines, that property is immune from forfeiture and the "enterprise" cannot be dissolved. Racketeers could simply enter the

magazine business to avoid RICO forfeitures.

The record herein makes clear that Indiana's purpose is not to use RICO to restrain future expressive activities, but seeks the dissolution of an "enterprise" or forfeiture of property because of past criminal conduct. The penalties are imposed for reasons unrelated to the suppression of speech.

Obviously, some inconvenience to speech is caused by all criminal laws, including RICO. In every case where a person is imprisoned for distributing obscenity, the imprisonment limits that criminal's ability to distribute communicative material, as two justices of this Court noted in Vance v. Universal Amusement Co., 445 U.S. 308, at 320, 324 (1980) (Justices White and

Rehnquist). See also Arcara v. Cloud Books, ____ U.S. ____, 106 S.Ct. 3172, 92 L.Ed.2d 568, 577 (1986) (". . . every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.") But under Petitioners' reasoning, a person could engage in the RICO predicate offenses of prostitution, restraint of trade, or trafficking in stolen property at a commercial establishment which also sells paperback novels, and this would immunize the establishment from forfeiture. This would obviously provide a loophole for organized crime to avoid the intended impact of RICO and defeats the purpose of the statute.

This Court has repeatedly recognized that it does not abridge

freedom of speech to make a course of conduct -- in this case racketeering -- illegal, even though the conduct is in some respect carried out by means of expression. Cox v. Louisiana, 379 U.S. 559, at 563 (1966) (". . . it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." Quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490 at 502, 93 L.Ed. 834 at 843-44 (1949)).

Arcara v. Cloud Books, supra, is squarely on all fours. There, this Court upheld the closure of a pornography bookstore that was also

used as a place of prostitution. Like the Indiana RICO statute, the nuisance abatement legislation in Arcara was concerned with unlawful conduct and only incidentally related to expression. This decision is directly on point: "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal use of premises." 92 L.Ed.2d at 578. So long as there is no "speech suppressive motivation or policy" shown in the enforcement of the RICO statute it is constitutional. 92 L.Ed.2d at 578 N.4 (emphasis added). The Indiana RICO statute is applicable to all enterprises or property used in racketeering activity -- not just obscenity.

The Indiana Supreme Court recognized this stating that "the purpose of the forfeiture provision is totally unrelated to the nature of the assets in question." 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 565 (Ind. 1987). The remedies provided in RICO "are a legitimate tool in the attack on racketeering activity." Id. To find otherwise would allow persons to thwart the law by effectively shielding their enterprise "behind a pseudo-constitutional barrier." Id. Because RICO is an attempt to compel forfeiture of property used in racketeering activity and "not to restrain the future distribution of expressive materials" the Court held that RICO, as it pertains to the "predicate offense of obscenity" does

"not violate" the First Amendment. Id.

Where the purpose of a statute is unrelated to the suppression of speech, as with RICO, there are many circumstances which permit closure of businesses engaged in expressive activity. Closure of nonconforming adult bookstores and theatres is permitted under amortization provisions of "adult use" zoning ordinances. Hart Bookstores v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980); Northend Cinema Inc. v. Seattle, 585 P.2d 1153, 1160 (1978), cert. denied sub. nom. Apple Theatre v. Seattle, 441 U.S. 946 (1979). The denial of a license to open or operate an adult bookstore or theatre has been

upheld where denial was based on a prior prostitution, child pornography, indecent exposure, or obscenity conviction. Dumas v. City of Dallas, 648 F.Supp. 1061, 1073 (N.D.Tex. 1986), upheld at ____ F.2d ____ (5th Cir. 1988) (relying on Arcara, supra); also see 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Barrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D.Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978), cert. denied sub. nom. Gateway Books v. Jackson, 441 U.S. 952 (1979); West Gallery Corporation v. Salt Lake City Board of Commissioners, 586 P.2d 429 (Utah 1978). In Commonwealth v. Croatan Books, 323 S.E.2d 86 (Va. 1984), the

Virginia Supreme Court upheld a bookstore's closure based on evidence that homosexuals congregated there to engage in sexual acts -- even though there was "no evidence" that the store sold obscene material -- because the closure was "based on criminal activities occurring at the site." 323 S.E.2d at 89.

Indeed, other cases have upheld closure of bookstores under abatement of nuisance statutes because of illegal conduct unrelated to expression. See e.g. Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975), dismissing the appeal from State ex rel. Ewing v. "Without a Stitch", 307 N.E.2d 911 (Oh.1974); State, ex rel. Kidwell v. U.S. Marketing, Inc., 631 P.2d 622, 25 ALR 4th 381 (Id. 1983), jurisdiction

noted 454 U.S. 1140, 71 L.Ed.2d 291, 102 S.Ct. 996, and appeal dismissed by U.S. Marketing, 455 U.S. 1009, 71 L.Ed.2d 878, 102 S.Ct. 1649 (the Supreme Court of Idaho held that a one-year closure order under a nuisance abatement statute for a leased bookstore property did not constitute an unlawful prior restraint on speech.)[2] These cases, like ours,

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[2] This Court sought to address the issue of closure as a remedy in obscenity nuisance orders in Kidwell, supra, jurisdiction noted, 454 U.S. 1140 (1982). After an arson fire destroyed the bookstore, its owners filed for unilateral dismissal of their appeal, which was granted by the Clerk over the objection of the State of Idaho. 455 U.S. 1009 (1982). This was not a dismissal "by stipulation of parties," as indicated in Avenue Book Store v. City of Tallmadge, Ohio, 459 U.S. 997, 74 L.Ed.2d 393 at 394 (1982) (Justice White dissenting from denial of writ of certiorari). See also: U.S. Marketing v. Leroy, 524 F.Supp. 1277 (D.Idaho 1981).

are situations where speech is interfered with incidentally during punishment for past illegal and unprotected conduct.

It is readily apparent that simply because a person's speech is restrained or inconvenienced as the unintended and incidental result of a legitimate statute does not create an unconstitutional prior restraint on speech. As with most criminal statutes, every one of the predicate offenses under any RICO statute can arguably result in incidental suppression of speech. This is particularly so if the property used in the racketeering activity is a store that sells expressive materials. Petitioners' interpretation of the First Amendment would lead to the absurd result of invalidating use of

RICO whenever criminals put their money into such an "enterprise," and for that reason should be overturned. United States v. Powers, 307 U.S. 214, 217, reh'g denied, 308 U.S. 631 (1939).

The criminal nature of an "enterprise" can be proven as neutrally through sale of illegal obscenity as through sale of illegal drugs, guns, or forged documents (which is also speech). As long as the legislation is directed at unlawful conduct, and not motivated by suppression of speech, its purpose cannot be frustrated because the criminal activity is intertwined with expression.

Like prostitution in Arcara, the sale of obscenity is illegal conduct that a state may prohibit. Roth v. United States, 354 U.S. 476 (1957). The Indiana RICO statute is narrowly

drawn in its application since it imposes sanctions only on the sellers of obscenity, defining obscenity by the Miller standard.[3] As the Indiana Supreme Court recognized below, the state has an important societal interest in halting the flow of money into organized crime from the sale of obscenity. Goldsmith, 504 N.E.2d at 564. Any alleged impact on non-obscene pornography is incidental to that interest. See Arcara, 926 L.Ed.2d at 577, 578. It is not the motive or purpose of the law. Thus, even if the sale of pornography is intertwined with the sale of obscenity and is incidentally impacted, the result is not an unconstitutional prior restraint.

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[3] See Ind. Code § 35-49-2-1 defining obscene matter using the Miller test.

cf. Arcara, supra; Cox, supra.

B. First Amendment interests are adequately protected by forcing the prosecution to prove the predicate offense of obscenity before defendants can be convicted of racketeering.

It is critical to recognize that no one can be convicted of "racketeering" in this context until they have been proven guilty of selling illegal, unprotected, obscene matter. The Indiana obscenity statute clearly passes constitutional muster. Sedelbauer v. State, 428 N.E.2d 206 (Ind. 1981), cert. denied, 455 U.S. 1035 (1982); Ford v. State, 394 N.E.2d 250 (Ind.App. 1979). The Indiana obscenity statute gives "adequate warning of the conduct proscribed" so as to permit the law to be fairly administered. See Roth v.

United States, 354 U.S. 476, 491 (1957).

By requiring the state to meet the initial burden of proving the obscenity offense, it is established that a defendant is engaged in an illegal, unprotected activity. It should make no difference what criminal activity triggers the RICO sanctions or what "enterprise" the profits have been poured into. The intent is not to suppress speech, but to deter racketeering activities. Selling "obscene" matter has no more constitutional protection than any other RICO predicate offense.

## CONCLUSION

For the foregoing reasons this Court should uphold the decision of the Indiana Supreme Court in 4447 Corp. v.

Goldsmith, 504 N.E.2d 559 (Ind. 1987) and find that the Indiana RICO law, as applied to obscenity offenses, passes constitutional muster.

Respectfully submitted,

Thomas E. Collins
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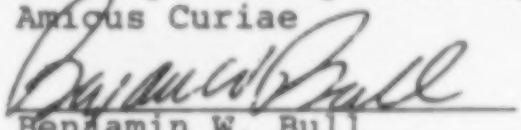
Amicus Curiae

By: 
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Nos. 87-470 and 87-614

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1987

No. 87-470

**FORT WAYNE BOOKS, INC.,**

*Petitioner,*

vs.

**STATE OF INDIANA, et al.,**

*Respondents.*

No. 87-614

**RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,**

*Petitioners,*

vs.

**STATE OF INDIANA,**

*Respondent.*

On Petitions For Writs Of Certiorari To The Supreme Court And Court Of Appeals Of The State Of Indiana

## BRIEF AMICUS CURIAE OF BOB CORBIN AS ATTORNEY GENERAL OF THE STATE OF ARIZONA IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS

Bob Corbin is the duly elected Attorney General of the State of Arizona. As Amicus herein, he has a fervent interest in the outcome of this case. He seeks guiding rules of law to enable himself and other prosecutors in Arizona to constitutionally enforce the Arizona RICO statutes, A.R.S. § 13-2301 et seq., in conjunction with Arizona's felony obscenity statutes, A.R.S. § 13-3501 et seq.

The application of Arizona's RICO laws to obscenity is the subject of State v. Feld, 155 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987), cert. denied, ____, U.S.___, 99 L.Ed.2d 482 (3-28-88), which is now pending in the Superior Court of Maricopa County and may be directly affected by this Court's disposition of the instant Indiana

cases. Like Indiana and the several other states with racketeering statutes which include obscenity offenses as predicate crimes, Arizona patterned the organized crime laws upon the federal RICO statutes, 18 U.S.C. § 1961 et seq.

Due to the gross misrepresentations of law and fact contained in the Petitions for writs of certiorari and the briefs for Petitioners herein, your Amicus desires to submit his position on the Scope and Standard of Review and the Constitutionality of Remedies involved in this review of the Indiana cases, its RICO/CRRA statutes, and the Opinion of its Supreme Court and Court of Appeals.

## SUMMARY OF ARGUMENT

I. SCOPE AND STANDARD OF REVIEW

The Indiana racketeering statutes are not facially unconstitutional under the test of Watson v. Buck, and are capable of constitutional application to the predicate offense of obscenity. As applied in the Indiana Supreme Court cases below, the civil forfeitures were limited to preservation of assets for a brief period until a prompt trial could have been held. In the criminal case from the Indiana Court of Appeals, the only remedy sought was conviction for the racketeering acts of distributing obscenity. These cases all involve hard-core pornography and no other application of RICO laws is before the Court.

## II. CONSTITUTIONALITY OF REMEDIES

The facts before the Court show these cases to be consistent with other criminal and civil applications of RICO laws to other predicate offenses. These cases are still in their pre-trial stages and further construction and fact finding would have been necessary to decide on appropriate remedies to be granted to the State of Indiana. Any hypothetical applications which could be considered overbroad or vague are not before the Court and were not sanctioned by the Indiana Supreme Court and Court of Appeals. Other federal and state obscenity and RICO cases would have guided and limited the application of the RICO remedies below, and the First Amendment nature of obscenity cases does not preclude the progress of fashioning a remedy for obscenity offenses under

RICO. Due Process is well established in these cases and the state courts must be presumed to be willing and ready to follow such precedent.

Assets of businesses corrupted by obscenity should be subject to forfeiture and restraining orders, since a racketeering enterprise is merely a tool of the crime and a conduit or depository of ill-gotten gains which should be reformed under RICO. When applied by the courts, as was done below, RICO laws can effectively punish the obscenity offenders and their property without unreasonable restraint or chill on legitimate expression. The only logical chill to be expected would be for other businesses to cease traffic in the types of illegal materials found obscene and a predicate to these RICO actions. Since these all involve hard-core pornography, the only chill

could be against the same or similar materials and this would be a reasonable result. No such chill has yet occurred, but the law is entitled to have such a reaction in order to obtain compliance with valid obscenity laws in the face of a major law enforcement problem.

## LAW AND ARGUMENT

### I. SCOPE AND STANDARD OF REVIEW: THE INDIANA RACKETEERING STATUTES ARE FACIALLY CONSTITUTIONAL AND SHOULD NOT BE INVALIDATED UNDER THE CIRCUMSTANCES PRESENT IN THESE CASES.

#### A. The Indiana Racketeering Statutes Under Review Must Be Evaluated In Light Of The Opinion Of The Indiana Supreme Court As Applied To Facts Proven Below And Not On Hypothetical Exaggerations.

Many years ago, this Court announced a rule of deferring to state courts the interpretation of state statutes. Watson v. Buck, 313 U.S. 387, 401-02 (1941). The one exception to this wise rule, so much ignored in present-day actions under 42 U.S.C. § 1983 (See Appendix A), was set out at 402:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in

> every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

The Supreme Court of Indiana, and the Court of Appeals of Indiana, reviewed these cases in light of the First Amendment to the U.S. Constitution to determine whether the "statutes constitute facially unconstitutional prior restraints in their application to the predicate offenses of obscenity". 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 560 (Ind. 1987). State v. Sappenfield, 505 N.E.2d 504, 506 (Ind. App. 1987)[1] Petitioners disagree with the conclusion of the Indiana courts that the RICO/CRRA[2] statutes do not violate

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[1] Hereinafter referred to as "4447 Corp." and "Sappenfield".

[2] "RICO/CRRA" refer to Indiana's 1980 Racketeer Influenced and Corrupt Organizations Act (Ind.Code § 35-45-6-1 et seq.) and Civil Remedies for Racketeering Activity statute (Ind.Code § 34-4-30.5-1 et seq.).

the U.S. Constitution, but it is untrue that the state courts below found the statutes "immune from First Amendment scrutiny". Brief for Petitioner Fort Wayne Books, Inc., at 22; [3] Brief for Petitioners (Sappenfield, et al.), at 15-16.[4] This was but the first of the many exaggerations of law and fact proposed by Petitioners in their briefs. Others border on the hysterical and absurd. This Court, however, cannot review these cases so capriciously. The Supreme Court of Indiana gave an authoritative construction to these laws and remanded the cases for trial, further hearings, and further applications to the facts to

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[3] Hereinafter referred to as "Fort Wayne Brief".

[4] Hereinafter referred to as "Sappenfield Brief".

be later proven in the trial courts. As stated in 4447 Corp., at 566-567:

> The Marion Circuit Court entered its ex parte seizure order upon a showing of probable cause to believe a violation of the RICO statute involving the property in question had occurred. As we construe the RICO statute, a showing of prior convictions for the alleged obscenity violations was not required. In order to prevail in the forfeiture action, appellee Goldsmith will of course have to show the existence of the obscenity violations in order to prove a violation of Ind.Code § 35-45-6-2 has occurred. It is at trial on the forfeiture and other requested CRRA remedies that the question of whether the materials are obscene will be litigated. A final determination of that question was not necessary at the hearing on the petition for seizure. [Id. at 566.]
>
> * * *
>
> At the point a seizure order is entered there has been a judicial determination that there is probable cause to believe violation of Ind.Code § 35-45-6-2 involving the property has occurred. The reason for an adversary

hearing on the seizure of the property would be to determine whether the property had been unlawfully seized. Generally, a defendant would initiate such action by the filing of a motion to vacate the seizure order, as was done in the instant cases, and we would expect the court to hold a prompt adversarial hearing on such a motion. If no motion to vacate is filed, or if the motion is denied, there will be a full adversarial hearing on the merits of the forfeiture action. Although Ind.Code § 34-4-30.5-3(a) does not specifically provide a time frame for that hearing, we would interpret the statute to require the hearing on the question of forfeiture to be held within a reasonable time.

Thus a defendant whose property has been seized pursuant to Ind.Code § 34-4-30.5-3(b) is afforded due process by a prompt adversarial hearing on a motion to vacate the seizure order and/or by a hearing on the question of forfeiture held within a reasonable time after the CRRA complaint and petition for seizure have been filed. In the instant case, appellants were afforded a hearing on their motions to dismiss the complaints and to vacate the seizure orders. Because the proceedings were

> halted by the filing of the interlocutory appeals, there has been no opportunity for trials on the merits of the CRRA complaints. At this stage we can discern no violation of appellants' due process rights.
>
> Transfer is granted and the opinion of the Court of Appeals is vacated. The causes are remanded for further proceedings not inconsistent with this opinion. [Id. at 567.]

B. The Operation And Effect Of The Indiana Racketeering Statutes, When Involving The Predicate Offense Of Obscenity, Has Been Given Limiting Construction By The Courts Below To Avoid Unconstitutional Applications.

The granting of the Petitions for writs of certiorari in these cases, 99 L.Ed.2d 268, may have been improvident, for want of jurisdiction as not final judgments within 28 U.S.C. § 1257, Flynt v. Ohio, 451 U.S. 619 (1981). Nevertheless, this Court is still bound by the interpretations placed on the state laws by the courts below (and by further

constructions that could and would take place in the "future proceedings" in the trial court and on re-appeal), and this Court must review the Indiana RICO/CRRA statutes as if originally written in the way construed. Guaranty Trust v. Blodgett, 287 U.S. 509, 513 (1933); Kingsley Pictures v. Regents, 360 U.S. 684, 688 (1959); Mishkin v. New York, 383 U.S. 502, 507-08, 510-11 (1966); U.S. v. 37-Photographs, 402 U.S. 363, 369-73 (1971); Ward v. Illinois, 431 U.S. 767, 772-73, 776 (1977); Metromedia v. San Diego, 453 490, n.26 (1981); Brockett v. Spokane Arcades, 472 U.S. 491 (1985) ("Brockett II").

In so doing, the "substantial overbreadth doctrine" applies. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494-95, n.5 (1982); New York v. Ferber, 458 U.S.

747, 772 (1982); Brockett II, supra at 503-04, n.12 (1985).

Amicus submits that obscenity statutes are not "pure speech" regulations, as are political or religious dialog or verbal expression cases. As held in People v. Souter, 178 Cal.Rptr. 111 (Ct. App. Cal. 1981), paying actors and actresses to engage in explicit sex acts before a camera in order to produce pornography is a violation of prostitution and pimping statutes. See also: People v. Fixler, 56 Cal. App.3d 321, 128 Cal. Rptr. 363 (1976); People, ex rel. Van De Kamp v. American Art Enterprises, 75 Cal. App.3d 523, 142 Cal. Rptr. 338 (1977); People v. Kovner, 409 N.Y.S.2d 349 (N.Y. Cty., Sup.Ct., 1978); People, ex rel. Van De Kamp v. American Art Enterprises, 177 Cal. Rptr. 776 (Cal. App. 1981); State, ex rel. Sensenbrenner v. Adult Book Store, 26

Ohio App.2d 183, 271 N.E.2d 13 (Franklin County, 1971), aff'd 35 Ohio St.2d 220 (1973), cert. denied 421 U.S. 934 (1975). The distribution of such hard-core pornography is therefore exploiting the work of prostitutes, and is at least a mixture of conduct and speech. Modern hard-core pornography should not be elevated to the protected class which political, and religious expression deserves. In the obscenity law area, the rule of substantial overbreadth should apply, as stated in Watson v. Buck, supra at 402, and as this Court stated in Hoffman Estates, 455 U.S., at 494-95, Footnote 5:

> 5. A "facial" challenge, in this context, means a claim that the law is "invalid in toto--and therefore incapable of any valid application."

Corollary to this are the rules ("wait until it's time to look" and "look only at what's before you")

discussed and followed in Brockett II, at 501-02:

> We call to mind two of the cardinal rules governing the federal courts: "'[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" United States v. Raines..., quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration... Citing a long line of cases, Raines also held that "[k]indred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

Amicus urges the Court to keep these principles at the forefront of this review. The Petitioners and the Amicus in their support argue this case as a picture of Armageddon, but it is

presented through the looking glass. Other state courts and legislatures nationwide are watching and we also deserve the reasonable review to which the Supreme Court of Indiana is entitled.

## II. CONSTITUTIONALITY OF REMEDIES: UNDER THE CIRCUMSTANCES PROVEN TO THE COURTS BELOW, THE INDIANA RICO/CRRA STATUTES WERE APPLIED CONSTITUTIONALLY TO THE PRESENT POINT IN THESE CASES AND DUE PROCESS MUST BE EXPECTED TO CONTINUE.

The facts proven and presented to the courts below are set out in the Indiana Supreme Court opinion, 504 N.E.2d at 561-63, and in the Indiana Court of Appeals opinion, 479 N.E.2d at 580-83. They show that this case is still at the pre-trial stage where motions are pending by the State for temporary seizure of assets and by the

Defendants to modify or vacate the seizure orders.

In Indianapolis, based on a Complaint and Affidavits which seek to prove the obscenity predicates within the civil trial, the Trial Court ordered the two operating stores to preserve the status quo by listing their property and securing their business equipment. The third, yet unopened, store was ordered sealed until the trial, which was set for 72 hours after the temporary restraining orders were signed. The two open stores continued to operate and sell their hard-core pornographic materials. Thereafter, motions by Defendants delayed the trial and the resolution of pre-trial issues and resulted in this interlocutory appeal by the Defendants at their request. The Court of Appeals stayed the padlock order on the assets of the third store,

as well as the inventory and restraining order on the other two stores, so there was no pending Trial Court order restraining Defendants in Indianapolis when the matter was heard in the Indiana Court of Appeals and Supreme Court. The Indianapolis Defendants, 4447 Corporation, et al., abandoned their appeal after the Indiana Supreme Court decision and have not petitioned this Court for review, but further proceedings would be bound by the decision of this Court and any further mandate of the Indiana Supreme Court thereafter.

In Fort Wayne, the civil Complaint showed 39 criminal convictions at three stores to establish the predicate illegal activity and the Trial Court ordered assets seized pending disposition. After Defendants' motions to vacate or modify the orders

were heard and denied, the police seized the assets. After the Trial Court denied a second set of motions for return, Defendants sought and received an interlocutory appeal so their cases could be consolidated with the pre-trial appeal from Indianapolis that was then pending in the Court of Appeals. One year later, but before it released its opinion, the Court of Appeals granted a stay in the Fort Wayne cases and the stores were allowed to re-open. Therefore, there were no restrictions on the Fort Wayne stores at the time the Court of Appeals ruled and the cases went to the Indiana Supreme Court. This remains the status of these cases to this day.

The companion cases of Ronald and Connie Sappenfield and the Fantasy One and Two stores are purely criminal RICO informations alleging the RICO offenses

and the predicates of obscenity law violations to be proven at the criminal trial or trials. After the Court of Appeals (Fourth District) ruled the RICO/CRRA statutes inapplicable to obscenity offenses (in 4447 Corp. v. Goldsmith, 479 N.E.2d 578 (Ind. App. 4th Dist. 1985)), the Trial Court dismissed the RICO charges and the State appealed to the Indiana Court of Appeals (First District), which reversed after the decision of the Indiana Supreme Court (in 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987). State v. Sappenfield, 505 N.E.2d 504 (Ind. App. 1st Dist. 1987)). No asset seizures were sought or ordered in those cases.

Being the first uses of Indiana's RICO/CRRA statutes in obscenity crime contexts, these cases necessarily required careful attention from the Trial Courts involved. The trial in the

Indianapolis case had been set for 72 hours after the Complaint was filed, and the Fort Wayne case was delayed by defense motions so no trial date could be set. Although Petitioners, Fort Wayne Books, Inc. and the Sappenfields and Fantasy stores, make hypothetical assertions about the effect of the pre-trial orders in the Fort Wayne and Indianapolis civil cases, and the very filing of the criminal charges in No. 87-614, the cases must be limited to their posture and the facts presented below. These cases all involve so-called "adult bookstores" that sell nothing but hard-core pornography. These are not legitimate theaters showing "Hollywood" movies rated "PG" or "R", not general public bookstores like B.Dalton or Waldenbooks selling cookbooks, fiction, sports, reference, etc., and not chains of stores with

mixed goods like food, sundries, and magazines or films, like convenience and grocery stores. A review of the civil pleadings, affidavits, and criminal information shows these businesses engaging solely in pictorial materials of explicit sex acts.

The State prosecutors asked for several RICO and CRRA remedies in the civil cases and only for criminal penalties upon conviction in the criminal case. Whether any of these remedies, or any others, would have been granted would depend on the proof and disposition at trial and on further construction of the statutes and evaluation of applicable remedies by the Trial Courts below, had the cases proceeded either before or after the Indiana Supreme Court ruled.

This Court would normally reserve ruling on pre-trial issues, Flynt v. Ohio, supra, but it must also be remembered that the Trial Courts would have followed the Indiana Supreme Court decision on the issues decided in 4447 Corp. The Trial Courts would further have to consider the other issues, arguments, and precedents for remedies and procedures not covered by 4447 Corp.

In both Fort Wayne and Indianapolis, only one pre-trial ex parte order was issued, for temporary asset seizure, yet the Trial Courts devoted significant effort to the resolution of motions on several novel and complicated issues before the appeals were certified. None of the other remedies prayed for (affecting licenses, other assets, business continuation, etc.) were reached at those pre-trial stages.

Trial courts must continue to interpret, limit, construe, and apply the procedures and remedies to the specific facts, in light of the special First Amendment considerations attending every obscenity-related case. As an example, the stages of trial court resolution of proof, guilt, punishment, forfeiture, and procedure issues by the U.S. District Court in the first federal obscenity RICO action is illustrative. See the several decisions of the Eastern District of Virginia in United States v. Pryba, et al., 674 F.Supp. 1502 (Oct. 8, 1987) (re: conflict of counsel); 674 F.Supp. 1504 (Nov. 3, 1987) (constitutionality of RICO in obscenity cases, forfeiture, prior restraint, punishment, due process, ex post facto) (cited in Fort Wayne Brief at 25); 674 F.Supp. 1518 (Nov. 18, 1987) (standard of proof, proof of obscenity); Order of

Forfeiture, Order of Nov. 18, 1987 (unreported) (copy in Brief for Petitioner Fort Wayne Books (Fort Wayne Brief), Appendix B, App. 9) (post-trial forfeiture Order of related assets upon jury verdict, rights of innocent third parties); 678 F.Supp. 1218 (Jan. 20, 1988) (motion for acquittal, sufficiency of evidence); 678 F.Supp. 1225 (Jan. 29 and Feb. 12, 1988) (inadmissibility of certain polls, community standards of "acceptance" vs. "tolerance" or availability); 680 F.Supp. 790 (Mar. 8, 1988) (state obscenity conviction admissible).

A similar process was begun in these cases. The Indiana courts cannot be presumed to have intended to refuse to consider prior restraint and due process issues as the cases proceeded. As in Pryba, the remedies to be applied below would be limited to the special

circumstances presented in each case. The stores in Fort Wayne and Indianapolis were all devoted to hard-core pornography and the Trial Courts should have found, as they did, that their assets needed to be preserved while the determinations of liability and forfeiture were determined as soon as possible.

A. The RICO/CRRA Remedies Of Closure And Forfeiture May Constitutionally Be Applied To Business Enterprises Which Have Been Corrupted By Violations Of Obscenity Statutes As Well As To Businesses Corrupted By Other Predicate Crimes.

The State in each of the civil cases below assumed the burden of proving the illegal obscenity predicates, and the restraining-seizure orders were intended to preserve the assets only for the brief period until the prompt trial could have been held.

Therefore, the requirements for due process were met as set out by the Court in Southeastern Promotions v. Conrad, 420 U.S. 546, at 560 (1975).

As pointed out by the Indiana Supreme Court in 4447 Corp. at 564, and by the Court of Appeals in Sappenfield at 505, the RICO acts are designed as strong medicine against the epidemic of organized crime involvement in the hard-core pornography racket, as they are in other activities of organized crime. See also: Russello v. U.S., 464 U.S. 16, 26-28 (1983). The central theory of RICO is that the corruption of a business through crime, whether drugs, prostitution, arson, or obscenity, make that enterprise subject to treatment as an unlawful depository of economic interests. Once corrupted, such an enterprise may be treated as having assets subject to forfeiture to prevent

unjust enrichment from contraband. See: U.S. v. 37 Photographs, 402 U.S. 363, 376-77 (1977). In this regard, the pre-trial seizure and restraining orders in Fort Wayne (and Indianapolis) were consistent with other orders to preserve assets pendente lite, even though final forfeiture cannot attach until after verdict and proof of the related nature of each asset to the crimes proven. See: U.S. v. Ginsburg, 773 F.2d 798, 800-03 (7th Cir. 1985), U.S. v. Roberts, 749 F.2d 404, 409-10 (7th Cir. 1984); U.S. v. Lizza Indust., 775 F.2d 492, 497-99 (2nd Cir. 1985); U.S. v. Zielie, 734 F.2d 1447, 1458-59, 1462-63 (11th Cir. 1984); U.S. v. McManigal, 708 F.2d 276, 283-90 (7th Cir. 1983); U.S. v. Martino, 681 F.2d 952, 954-59 (5th Cir. 1982); U.S. v. Godoy, 678 F.2d 84, 86-88 (9th Cir. 1982).

Such pre-trial seizures or restraining orders against assets, of whatever kind, differ from nuisance abatement actions where the only element of the nuisance is the sale of obscene items. RICO acts require additional elements of proving the enterprise, the illegal use of the enterprise to profit from criminal activity, and the relation back of the assets to the racketeering. A business is not "closed" because of past sales of obscenity, as in State, ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Id. 1983), juris. noted at 454 U.S. 1140, app. dismissed by U.S. Marketing (over the State of Idaho's objection to the Clerk of this Court) at 455 U.S.1009 (contrary to the assertion in Avenue Book Store v. Tallmadge, 459 U.S. 997 (1982) (Justice White dissenting) that it was "by stipulation"), but is merely - subject to orders preserving

jurisdiction over assets for a brief period until the trial court can determine the propriety of forfeiture of illegal proceeds of racketeering. Although the final closure in nuisance actions is proper, as in Kidwell, supra, without offending Vance v. Universal Amusements, 445 U.S 308 (1980), other final remedies are also possible within constitutional limits, as in Tallmadge, supra (enjoining future sales of "obscenity") or State, ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 95, 307 N.E.2d 911 (1974), appeal dismissed f.w.o.s.f.q. 421 U.S. 923 (1975). See also: Spokane Arcades v. Brockett, (Brockett I), 631 F.2d 135, at 139 (9th Cir. 1980), aff'd. 454 U.S. 1022 (1981).

How an enterprise is proven to have been corrupted is unrelated to what type of enterprise it is. 4447 Corp. at 565. The aim of the statutes is to prevent

criminals from intentionally using a business scheme to make, launder, or dispense proceeds of illegal acts and to punish such unfair business practices by divestment of such poison fruit. See: U.S. v. Th[illegible], 474 F.Supp. 134 (N.D. Ga. 1979); U.S. v. Conner, 752 F.2d 566, 575-78 (11th Cir. 1985); U.S. v. Cauble, 706 F.2d 1322, 1345-49 (5th Cir. 1983); U.S. v. Martino, supra at 960-61; U.S. v. Grande, 620 F.2d 1026, 1037-39 (4th Cir. 1980); U.S. v. Huber, 603 F.2d 387, 392-97 (2nd Cir. 1979). Trial courts require flexibility to avoid constitutional problems yet preserve the power to apply effective sanctions in appropriate cases. U.S. v. Busher, 817 F.2d 1409, 1413-16 (9th Cir. 1987). State and federal law enforcement needs the RICO laws to deal with the controlling parts of the hard-core obscenity industry and "must

be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems". Young v. American Mini Theatres, 427 U.S. 50, 71 (1976).

The existence of the many decisions, limiting and shaping the RICO remedies to provide a firm fairness in individual situations, strengthens the constitutionality of the state and federal laws in the obscenity area. The state courts will be guided by these principles and fashion remedies in ways that are as consistent as possible. These trial court decisions will then be reviewed on appeal to further guarantee their propriety. The non-final orders and proceedings in the Indiana courts below should have an opportunity to develop under the facts of each case and further add to the law of RICO as applied to obscenity. The complexity of this task is more reason to let the

state courts develop these issues rather than a reason to interfere. Moore v. Sims, 442 U.S. 415, 427, 429-30 (1979).

The hypothetical grounds presented by Petitioners herein require this Court to presume unconstitutional interpretations by the Indiana courts. This was the error of the Ninth Circuit in Brockett v. Spokane Arcades (Brockett II), 472 U.S. 491 (1985), and this Court correctly ruled that the first inquiry should be whether the statute would receive an invalid interpretation or application in the trial courts and if so to declare such use improper and only enjoin such use, or excise such provision, if an unlawful use is the only probable or possible use forseeable. If a reviewing court cannot say that a trial court will violate the constitution, it must presume due process will be afforded and allow the

cases to proceed. If the court finds that the trial court will or could make unconstitutional applications then the correct interpretation should be declared and presumed to be honored. McCarthy v. Briscoe, 553 F.2d 1005, 1007 (5th Cir. 1977). Only if an invalid use is unavoidable, such as with a wholly unsavable statute under the Watson v. Buck test or a grievous fact situation as in Dombrowski v. Pfister, 380 U.S 479 (1965), should the reviewing court sever part of the law, or engage in partial invalidation, or enjoin or forbid certain applications. Brockett II, supra at 502-05. This is especially pertinent in pre-trial proceedings. Flynt v. Ohio, supra at 622.

A common thread in the Brief for Petitioner Fort Wayne Books is the exaggerated reach or possible reach of RICO and its enormous chilling effect.

In the Fort Wayne Brief at 13 and 23-24, the assertion is voiced that the Indiana Supreme Court sanctioned the closure of all stores in a chain if two copies of any item are found obscene. The state Supreme Court's opinion in 4447 Corp. at 564 and 566-67, reads otherwise and requires proof of a nexus between the racketeering acts and the remedies granted. Such an absurd situation was not even before the Indiana Supreme Court, much less discussed or approved. The facts before the Court below involved proof that certain stores were connected to related and illegal sales of obscene items and these stores had assets directly related to those illegal acts.

It is inconceivable that any court would order the closure or seizure of other stores or assets not proven to be connected to the specific

offenses proven. In light of the prior decisions of this Court and the federal courts cited above, it is unreasonable to assume, even "for the sake of argument", that a court would be willing to find two sales of a magazine or two rentals of a film to permit seizure of all (or even any other) stores or their inventories or business equipment. All the stores and Defendants below were specifically connected with several specific crimes involving hard-core obscenity. In this context the Indiana courts began to fashion the due process needed to safeguard the State's rights to effective application of state law while also safeguarding against unconstitutional prior restraint. Some restraint is always required by law, and deterrence of crime is a legitimate function of even obscenity statutes. Polykoff v. Collins, 596 F.Supp. 584,

591 (D. Ariz. 1984), aff'd. 816 F.2d 1326 (9th Cir. 1987). See also: Vance, supra at 324-25 (Justice White dissenting). This is more than obvious in the modern world where obscenity offenses are not only necessary but inherent in the traffic in hard-core pornography by today's porn industry.

As this Court recognized in Russello, supra at 24-27, new weapons, broadly defined, are needed to combat this national disgrace, or else "whole areas of organized criminal activity would be placed beyond" the law. The old maxim that "the law is presumed to know what everyone knows" is embodied in the historical treatment by this Court of "hard-core pornography" as an obvious form of unprotected criminal obscenity. From Roth v. U.S., 354 U.S. 476 (1957), through Manual Enterprises v. Day, 370

U.S. 478, 489 (1962), to Miller v. California, 413 U.S. 15 (1973), this Court has used "hard-core pornography" as a shorthand term for "obscenity". Where penetration is clearly visible, such "PCV porn" is such that everyone knows it when they see it. See also: Taylor, "Pornography and the First Amendment", Criminal Justice Reform, chapter 11 (D.C.: Free Congress Research and Educational Foundation, 1983); Milligan, "Obscenity: Malum in Se or Only in Context: The Supreme Court's Long Ordeal", 7 Capitol Univ. Law Rev. 631 (1978).

In Mishkin v. New York, 383 U.S. 502, at 506-08 (1966), this Court noted that New York courts had limited their obscenity statute to reach only "hard-core pornography" and that this limitation "is more stringent than the Roth definition" and therefore "the

judgment that the constitutional criteria are satisfied is implicit in the application of" New York's statute. (Emphasis added.) See also: U.S. v. West Coast News, 357 F.2d 855, 857 (6th Cir. 1966); State v. Voshart, 159 N.W.2d 1, 6 (Wisc. 1968); Woodruff v. State, 273 A.2d 436 (Md. App. 1971); Whiting v. Roxy, Ltd., 293 N.E.2d 889, 891 (Ohio C.P. 1973); Zeitlin v. Arnebergh, 383 P.2d 152 (Cal. 1973); 5297 Pulaski Highway v. Perryville, 519 A.2d 206, 214 (Md. App. 1987). And see: Peters v. State, 449 N.E.2d 311, 312-13 (Ind. App. 1983).

The use of the "hard-core rule" gives limitation and guidance to obscenity-RICO actions (as in the cases below, 4447 Corp. and Sappenfield, and Pryba, supra) as surely as the previous obscenity decisions in Illinois gave guidance on what was known as obscene in

that state. See: Ward v. Illinois, 431 U.S. 767, at 771-73 (1977). The "vagueness" of the "Miller Test" and scienter rules, as they apply in Indiana obscenity law (See: Sappenfield Brief at 25-30, Fort Wayne Brief at 53-61) is as absurd in these cases as it was in Ward, supra, and Hamling v. U.S., 418 U.S. 87, 118-23 (1974), in light of the many Indiana obscenity cases interpreting and applying these concepts. See: Van Sant v. State, 523 N.E.2d 229 (Ind. App. 1988); Albright v. State, 501 N.E.2d 488 (Ind. App. 1986); American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd. 475 U.S. 1001 (1986); Saliba v. State, 475 N.E.2d 1181 (Ind. App. 1985); Sedelbauer v. State, 462 N.E.2d 244 (Ind. App. 1984); Richards v. State, 461 N.E.2d 744 (Ind. App. 1984); Sedelbauer v. State, 455 N.E.2d 1159 (Ind. App. 1983); Peters v. State,

supra, 449 N.E.2d 311 (Ind. App. 1983); Porter v. State, 440 N.E.2d 690 (Ind. App. 1982); Isaac v. State, 439 N.E.2d 1193 (Ind. App. 1982); McNeal v. State, 434 N.E.2d 127 (Ind. App. 1982); Sedelbauer v. State, 428 N.E.2d 206 (Ind. 1981), cert. denied 455 U.S. 1035 (1982); State, ex rel Drost v. Superior Court, 416 N.E.2d 1247 (Ind. 1981); American Films v. State, 413 N.E.2d 1091 (Ind. App. 1981); Smith v. State, 413 N.E.2d 652 (Ind. App. 1980); Beach v. State, 411 N.E.2d 363 (Ind. App. 1980); State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), appeal dismissed f.w.o.s.f.q. 446 U.S. 931 (1980); State, ex rel. J.N.S., Inc. v. Municipal Court, 396 N.E.2d 361 (Ind. 1979); Hagood v. State, 395 N.E.2d 315 (Ind. App. 1979); Ford v. State, 394 N.E.2d 250 (Ind. App. 1979); Riley v. State, 389 N.E.2d 367 (Ind. App. 1979);

Massey v. City of Mishawaka, 378 N.E.2d 14 (Ind. App. 1978).

In the face of this wealth of precedent to guide Defendants and the state courts below (See also Appendix B for state RICO cases), Petitioners must be held to their burden to show beyond a reasonable doubt that the Indiana statutes are invalid, incapable of constitutional application, and not entitled to the presumption that they are valid and will be validly enforced. The record in the instant cases shows no facial or applied invalidity that is not or cannot be construed correctly by the Indiana courts. See also: Naked City, Inc. v. Aregood, 667 F.Supp. 1246 (N.D. Ind. 1987); Moore v. Sims, supra at 429-30.

B. The Restraint Upon The Distribution Of Materials Not Adjudicated As Obscene Is

Incidental Only To Those Items Forfeited As Property Assets Of A Corrupt Enterprise And Does Not Amount To An Unconstitutional Prior Restraint Upon Other Materials Or Against The Same Or Similar Items In Commerce At Other Locations.

Petitioners, and their amicus, argue the chilling effect of RICO law on legitimate expression, yet they have offered no proof to the courts below, nor to this Court, that any actual restraint has in fact occurred. The Fort Wayne Brief, at 10, notes that the Indiana Court of Appeals granted a stay that removed the padlocks on the three stores in Fort Wayne which meant they were "allowed to resume operations". Petitioners fail to mention that all three Fort Wayne stores did re-open and one is still operating today, selling hard-core ("PCV") pornography of the type found obscene in the Indiana obscenity cases cited above and in such

cases as Hamling v. U.S., 418 U.S. 15 (1974), and U.S. v. Battista, 646 F.2d 237 (6th Cir. 1981), cert. denied 454 U.S. 1046 (1981) ( Deep Throat). The stores in the Sappenfield case were never closed or restrained, the operating stores in Indianapolis were never closed or subject to seizure, and the third store which had assets seized in Indianapolis was released from its restraining order.

The burden should be on Petitioners to prove that unreasonable consequences have followed the RICO statutes, as the parties did in Dombrowski, supra. The truth is that hard-core obscenity is out of control and a major problem for law enforcement. See also: "Project: An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity", 52 New York Univ. Law Rev. 928 (1977); "The Pornography Industry",

Boston Globe series of Feb. 13-18, 1983. A question that begs itself from amicus briefs such as from the Video Software Dealers Association (VSDA) and American Booksellers Association (ABA) (See: 99 L.Ed.2d 268), is whether the ABA members desire to distribute hard-core "PCV" pornography (they don't now) and whether the VSDA video rental stores are really chilled if they continue to rent hard-core titles all across the country, as they do. The obscenity laws of Congress and the state legislatures are supposed to prevent and "chill" the traffic in obscenity, and "PCV porn" is not arguably outside that legitimate reach of those statutes.

Within the pornography industry, there are well defined classes of materials. Hard-core pornography consists of "PCV" materials of hetero-and homo-sexual acts, bondage,

sado-masochism, bestiality, etc., as well as the simulated material with genitals displayed but no penetration shown. Both actual and simulated were included as "hard-core" by this court in Manual Enterprises v. Day, supra and Miller, supra at 24-25, but the porn trades usually refer to hard-core as only "PCV" and try to include simulated ("medium core") in with "soft-core". Soft-core pornography rightfully includes only nudity and little or no sexual activity. Only so-called "adult bookstores and theatres", and now many "mom and pop" video stores, carry hard-core "PCV" pornography, whereas legitimate theater chains which show Hollywood movies do not show any "PCV". Cable services such as Playboy Channel show extensive simulated sex ("medium core"), as do many "men's sophisticate" magazines such as Penthouse and Hustler.

Hollywood movies which are rated "R" or "PG" by the Motion Picture Associtions of America (MPAA) show nudity and some brief scenes of simulated intercourse ("soft-core"), like the scenes in Carnal Knowledge, Jenkins v. Georgia, 418 U.S. 153 (1974), as well as magazines such as Playboy and Playgirl. No reported or known obscenity case has been brought under any Miller based federal or state law against any movies rated "R" or "PG" by the MPAA anywhere in the United States and all known cases have involved hard-core materials that explicitly show "PCV" or graphic simulated sex. There has been no unconstitutional chill if the only result of obscenity and RICO laws has been to keep "Hollywood" movies from forcing actors and actresses to perform actual sex acts in MPAA rated movies (which would automaticaly make them "X"). There has not been

sufficient legitimate chill if the video stores and "adult stores and theatres" continue to distribute "PCV" materials. If the effect of RICO and obscenity law enforcement is to convince or force the marketplace to remove hard-core pornography, then this would not be unreasonable under the First Amendment and would be the legitimate aim of such laws. See: Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Vance v. Amusement Co. 445 U.S. at 324 (Justice White Dissenting); New York v. P.J. Video, Inc., 475 U.S. ___, 89 L.Ed.2d 871 (1986). See also: Agreement for the Suppression of the Circulation of Obscene Publications (1910,1949), 37 Stat. 1511; Treaties in Force 209 (U.S. Dept. State, Oct. 31, 1956), cited in Roth v. U.S., 354 U.S. 476, 485, n.5 (1957). Any unconstitutional chill or prior restraint should be affirmatively

shown by Petitioners and they have failed to offer any proof that any has occurred anywhere. Petitioners really seek permission to engage in the open and notorious traffic in hard-core pornography, and want freedom from the reach of any obscenity laws, especially those which could be the most effecive such as RICO. This Court has already recognized the propriety of obscenity laws, Roth, Miller, Paris, Hamling, supra; Pope v. Illinois, 481 U.S. ___ 95 L.Ed.2d 439, 107 S.Ct. 1918 (1987), and if obscenity is subject to prohibition as a criminal act, or even a civil, quasi-criminal or nuisance violation, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Huffman v. Pursue, 420 U.S. 592 (1975); Art Theater Guild v. Ewing, 421 U.S. 923 (1975), then obscenity should be subject to RICO laws. The First Amendment is protected by the

presumption of protection accorded allegedly obscene materials in the same way criminal defendants are protected in other cases by the presumption of innocence. Once removed by proof beyond a reasonable doubt in criminal cases or by clear and convincing evidence or a preponderance in civil cases, Cooper v. Mitchell Brothers, 459 U.S. 944 (1982), all that is left is an unlawful act. If the presumption of protection were absolute, no temporary seizures on probable cause could occur prior to trial in any obscenity case. P.J. Video, supra; Heller v. New York, 413 U.S. 483 (1973); U.S. v. 12 200-Ft. Reels, 413 U.S. 500 (1973). The statutory and common law elements of proving obscenity and scienter are the due process protections to which pornographers are entitled. These are strict and complicated burdens for the

prosecution, Pope v. Illinois, supra, and total immunity from enforcement is not also warranted.

If the state can show a pattern of racketeering by obscenity offenses, and a relation to a business of assets used in or derived from this illegal pattern, then forfeiture is appropriate. The Indiana Supreme Court was correct in concluding that corruption is not based on how the corruption occurs. 4447 Corp., at 564. The Arizona Court of Appeals in State v. Feld, 745 P.2d 146, 152-56 (Ariz. App. 1987), cert. denied ___U.S.___, 99 L.Ed.2d 482 (1988), upheld the purely criminal sanctions of RICO to obscenity (such as were charged in Sappenfield herein), but felt constrained to eliminate most of the restraining and forfeiture powers except as to the exact items found obscene or the exact dollar amount of those items.

This effectively kills the power of the courts in RICO actions to punish and reform a corrupt business and its operators when caught systematically violating obscenity laws. If a person used drug or prostitution or gambling proceeds to buy and run a bookstore or grocery store, this Court should have no problem allowing forfeiture of the inventories of books and food and any other related interest in the "legitimate" business. This would not be a true prior restraint on those books seized because the government can sell them and all other businesses in the country can sell those books and even the defendants can sell those books elsewhere. Just as the injunction in Avenue Book Store v. City of Tallmadge, supra, adds effectiveness to a nuisance action, rather than enjoining only the specific items found obscene, and just

as a store can be closed for a year after being found a nuisance because its stock in trade is found obscene, State, ex rel. Kidwell v. U.S. Marketing, supra, assets of a racketeering enterprise should be subject to seizure or restraint, and forfeiture, if used to violate obscenity laws. Closure and forfeiture are penalties for corrupting a business, not a direct suppression of the specific books or films then in inventory. Any restraint goes only to those items at that store and is incidental to a proper penalty for a violation of law. Arcara v. Cloud Books, 478 U.S. ___, 92 L.Ed.2d 568, 576-78 (1986). Therefore, Arcara and P.J. Video, supra, support treating obscenity as any other predicate RICO offense and allow reasonable forfeitures of assets or closure of the corrupted business.

## CONCLUSION

The Final Report of the U.S. Attorney General's Commission on Pornography (DOJ, 1986; Rutledge Hill Press, 1986), although ridiculed (and rightfully feared) by the pornographers, speaks for itself and outlines the true need for RICO in breaking up the organized crime dominated hard-core pornography syndicates. The "intractable" obscenity problem will not go away if the pornographers have anything to do with it. F.C.C. v. Pacifica Foundation, 438 U.S. 726, at 744, n.19 (1978). Now is the time to guide law enforcement in making effective use of RICO laws against the obscenity industry. Just as law enforcement in Arizona will suffer

greatly under State v. Feld, supra, the whole country will continue to suffer if the Indiana courts are reversed and the RICO laws made ineffective in this national organized crime business.

> This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale - an absolutist, "anything goes" view of the First Amendment - because it will lighten our burdens.
>
> ★ ★ ★
>
> "Our duty admits of no substitute for facing up to the tough individual problem of constitutional judgment involved in every obscenity case."
>
> Miller v. California, at 29-30.

Respectfully submitted,

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Attorney General
State of Arizona

Bruce A. Taylor
Counsel of Record for Amicus

# APPENDIX A

## APPENDIX A

History of Three State Obscenity Law Challenges in Federal Courts

Ohio:

Sovereign News Co. v. Falke, 448 F.Supp. 306-408 (N.D. Ohio 1977) ("Sovereign I") (invalidating Ohio obscenity definition and enjoining entire statute); State v. Ronald Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978) (construing and upholding Ohio obscenity statute); Sovereign News Co. v. Corrigan, 610 F.2d 428 (6th Cir. 1979), cert. denied, 447 U.S. 923 (1980) (remanding "Sovereign I" for reconsideration in light of State v. Burgun); Sovereign News Co. v. Falke, C77-230 (N.D. Ohio 1980) ("Sovereign II") (on remand, re-invalidating Ohio law and rejecting State v. Burgun); Turoso v. Cleveland Municipal Court, 531

F.Supp. 829 (N.D. Ohio 1980) (denying habeas corpus, one of six habeas cases where writ granted in four and denied in two); Sovereign News Co. v. Falke, 674 F.2d 484 (6th Cir. 1982), cert. denied, 459 U.S. 864 (1982) (reversing "Sovereign II" and following State v. Burgun); Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982), cert. denied, 459 U.S. 880 (1982) (reversing writs of habeas corpus and affirming denials of habeas writs and upholding Ohio statute under State v. Burgun)... (Sovereign News Co. v. Falke dismissed by District Court parties 11-30-82).

Washington:

Spokane Arcades v. Ray, 449 F.Supp. 1145 (E.D. Wash. 1978) (invalidating in toto Washington's new moral nuisance law, Initiative 335), affirmed, Spokane Arcades v. Brockett, 631 F.2d 135 (9th

Cir. 1980), affirmed summarily, Brockett v. Spokane Arcades, 454 U.S. 1022 (1981) ("Brockett I"); Spokane Arcades v. Eikenberry, 544 F.Supp. 1034 (E.D. Wash. 1982) (denying injunction against new moral nuisance statute passed to replace Initiative 335; upholding statute, and abstaining in part), reversed, J-R Distributors v. Eikenberry, 725 F.2d 482 (9th Cir. 1984) (Striking entire state obscenity statute), reversed, Brockett v. Spokance Arcades, 472 U.S. 491 (1985) ("Brockett II")... (The five suits were then dismissed.)

Texas:

Universal Amusement Co. v. Vance, 404 F.Supp. 33 (S.D. Tex. 1975) (21 federal suits throughout Texas ordered consolidated, state obscenity nuisance and search warrant statutes invalidated and all prosecutions enjoined), reversed, King Arts Universal Amusement

Co. v. Vance, 559 F.2d 1286 (5th Cir. 1978) (one of the cases, Dexter v. Butler, was affirmed), King Arts reversed on rehearing en banc, Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978) (Dexter also re-affirmed at 587 F.2d 176) (Texas nuisance statute, as yet unused, invalidated in toto), affirmed, Vance v. Universal Amusement, 445 U.S. 308 (1980). Red Bluff Drive-In v. Vance, 648 F.2d 1020 (5th Cir. 1981) (consolidated challenges to new Texas criminal obscenity statutes-District Courts denied relief-affirmed in part, abstention in part after opinion on merits of statute); Andrews v. State, 652 S.W.2d 370 (Tex. Cr. App. 1983) (construing and upholding statutes and refusing to follow advisory opinion of Red Bluff on definitions).

## APPENDIX B

State Cases on RICO Actions

Martinez v. Heinrich,
521 So.2d 167 (Fla. App. 1988)

DeRuyter v. State,
521 So.2d 135 (Fla. App. 1988)

State v. Spooner,
520 So.2d 336 (La. 1988)

State v. Champagne,
538 A.2d 193 (Conn. 1988)

People v. Milton,
732 P.2d 1199 (Colo. 1987)

Morgenthau v. Citisource, Inc.,
504 N.Y.S.2d 108 (A.D. 1 Dept. 1986)

State v. Henderson,
717 P.2d 933 (Ariz. 1986)

Banderas v. Banco Central,
461 So.2d 265 (Fla. App. 1985)

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487 A.2d 722 (N.J. 1985)

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493 N.Y.S.2d 406 (Sup. 1985)

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321 S.E.2d 704 (Ga. 1984)

Waller v. State,
303 S.E.2d 437 (Ga. 1983)

Hampton v. Thurmand,
619 S.W.2d 310 (Mo. 1981)

Bowden v. State,
402 So.2d 1173 (Fla. 1981)

## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 1988, three copies of the foregoing Brief Amicus of Bob Corbin, as Attorney General of the State of Arizona in Support of Respondents, were sent by U.S. Mail, postage prepaid, to:

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Nos. 87-470 and 87-614

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## MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

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**MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.**

## STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International

Periodical Distributors Association, Inc. (collectively referred to as *amici*), hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached joint brief, *amici curiae,* in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc. Attorneys for petitioners consented thereto; the consent of the attorney for respondents was requested but refused.

## The Amici

The *amici's* members publish, produce, distribute, and sell books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 4,000 members consisting of over 6,000 retail outlets. The members include private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, uni-

versities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for almost four hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

## Interest of the Amici

The interest of *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the legal principles involved in these two cases impact upon those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions,[1]

---

[1] The Indiana RICO statute is modeled after the Federal RICO statute (18 U.S.C. § 1961 *et seq.*) and is similar to the RICO statutes of many other states.

are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." Such a harsh possible result obviously chills the exercise of First Amendment rights by the legitimate booksellers, distributors and publishers who are the members of *amici*.

This concern of legitimate businesses is not unwarranted. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of

no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney General's Commission on Pornography, *Final Report*, 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides as effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in the community.

Unless the Court reaffirms the existing doctrine relating to prior restraints, and continues to insist on adequate procedural safeguards where seizures of presumptively First Amendment protected materials are involved, RICO statutes like the Indiana law in these cases will surely chill the production and distribution of a wide range of First Amendment protected materials.

*Amici* filed an *amicus* brief in *Fort Wayne Books, Inc. v. Indiana* in support of the petition for certiorari, their

motion to file same having been granted. 108 S. Ct. 1106 (1988).

In view of the foregoing, *amici* seek leave to file the attached brief.

Respectfully submitted,

---

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Dated: May 11, 1988

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## BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

## STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International Periodical Distributors Association, Inc. (collectively re-

ferred to as *amici*), submit this joint brief, *amici curiae*, Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy in support of the petitioners, Fort Wayne Books, Inc., Two, Inc., having submitted a motion for permission to file same.

## Interest of the Amici and Summary of Argument

The interest of the *amici* reflects their continuing interest in the decisions of this Court balancing First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the RICO penalties at issue in these two cases create an unconstitutional prior restraint on First Amendment protected materials, and will have a chilling effect on the activities of those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions, are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." The threat of such a death penalty on one's business obviously chills the exercise of First Amendment rights by booksellers, distributors and publishers who are not themselves dealers in obscene ma-

terials. Cautious booksellers would avoid any publication which treads too close to the obscenity or "harmful to minors" threshold for fear of triggering draconian RICO penalties.

The concern of legitimate businesses that these RICO statutes will be used to curtail protected speech and publishing activities is hardly speculative. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography (the "Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" boycotts, picketing, and other "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney

General's Commission on Pornography, *Final Report* at 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene or "harmful to minors" and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which offends a vocal minority within a community.

*Amici* contend that the Indiana RICO statute and similar statutes violate the First Amendment in that they constitute an unconstitutional prior restraint on First Amendment protected materials under the doctrine first defined in *Near v. Minnesota*, 283 U.S. 697 (1931), that the statutes will have a chilling effect on First Amendment protected expression, and, further, that the statutes do not include the special protections that the Court has consistently imposed with respect to the seizure of presumptively First Amendment protected material.

## The Challenged Statute

The Indiana RICO statute was enacted in 1980, and is similar to the federal RICO statute, 18 U.S.C. § 1961 *et seq.* Basically, the statute provides that anyone who

acquires, maintains, or participates in any business through a "pattern of racketeering activity" is guilty of "corrupt business influence," a Class C felony. Ind. Code § 35-45-6-2. A pattern of racketeering activity is in turn defined as commission in the course of five years of two related offenses from a list of specified offenses. Ind. Code § 35-45-6-1. As interpreted by the Indiana Supreme Court, conviction for the offenses is not required. *4447 Corporation v. Goldsmith*, 504 N.E.2d 559, 566 (Ind. 1987). The list of offenses includes all Indiana obscenity law crimes. These crimes include not only importation or sale of obscene matter (Ind. Code § 35-49-3-1), but also disseminating to minors matter harmful to minors, displaying matter harmful to minors in an area to which minors have visual, auditory or physical access, or displaying for sale matter harmful to minors within 500 feet of a church or school. (Ind. Code § 35-49-3-3). In addition to the criminal penalty, the State may invoke the full panoply of civil sanctions contained in Indiana Code Sections 34-4-30.5-1 through 30.5-4.

The civil remedies available for a violation of the Indiana RICO law are severe. They include forfeiture of any property derived from or used in the course of the RICO violation. Ind. Code § 34-4-30.5-3. Property may even be seized for forfeiture, and placed under seal or removed, by an officer on ex parte court order up to 180 days prior to the filing of any formal adversary forfeiture action. Ind. Code § 34-4-30.5-4. In the cases *sub judice* the entire contents of several bookstores were seized, without even an *ex parte* review of most of the material, which included First Amendment protected materials. In

fact, the Indiana Supreme Court stated it to be "irrelevant" whether the assets seized and forfeited were obscene or not. 504 N.E.2d at 565. In addition, the Court may, on the bringing of an action to enjoin a violation, issue an injunction "prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of" the RICO law. Ind. Code § 34-4-30.5-2(2).

An injunction will be granted on a showing by a preponderance of the evidence that a RICO violation has occurred. Similarly, property may be civilly forfeited on a showing by a preponderance of the evidence that the property was derived from or used in the course of a RICO violation. Thus, massive forfeitures of property and injunctions against engaging in similar businesses in the future may be effected even without a criminal conviction for the triggering violations, which, if it were required, would require proof beyond a reasonable doubt. As described by the Indiana intermediate appellate court, the RICO statute permits "seizure orders of indefinite duration and create[s] a remedy of permanent forfeiture which would extend the protected materials and neutral instrumentalities." *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 590 n. 8 (Ind. Ct. App. 1985).

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## ARGUMENT

### I

### THE INDIANA RICO STATUTE CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT WHEN APPLIED BASED ON PREDICATE OFFENSES RELATING TO PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIAL.

The Indiana RICO statute provides for pre-judgment seizure and subsequent forfeiture of "any property used in the course of, intended for use in the course of, derived from, or realized through" a RICO violation. Ind. Code §§ 34-4-30.5-3 and 30.5-4. The overwhelming majority of books in a typical bookstore are not obscene, and most could not be deemed harmful to minors. Nevertheless, if over a five year period a store twice sold books judged by a particular community to be obscene, or sold to two minors books deemed harmful to those minors, or even, under the Indiana law, merely displayed two books harmful to minors in an area accessible to minors, the entire inventory of the store and all of its assets would be subject to forfeiture.[2] The store would thus be prevented from distributing the protected materials which at all times constituted an overwhelming portion of its business. The intent and obvious effect of this forfeiture provision (as demonstrated by its enforcement in this case and its companion cases below) is to cause a forfeiture of the entire business enterprise through which the violation was com-

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[2] It may, in fact, subject the assets of an entire chain of stores to seizure and forfeiture. In a recent federal RICO indictment brought in the Eastern District of Virginia, forfeiture of a chain of video stores was sought. *United States* v. *Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987).

mitted, and thereby prevent the individuals involved from continuing in the same general line of business. Ind. Code § 34-4-30.5-2(2) lends further support to this construction, since it expressly authorizes a court to issue an injunction prohibiting a defendant from engaging in a similar business.

When the predicate offense relates to sexually explicit materials and when the business is a bookstore, chain of stores, distributor of written materials, or publisher, these RICO penalties clearly constitute a prior restraint violative of the First Amendment. The Court has consistently stated that "[a]ny system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan,* 372 U.S., at 70; *New York Times Co. v. United States,* 403 U.S., at 714; *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne,* 393 U.S. 175, 181 (1968); *Near v. Minnesota ex rel. Olson,* 283 U.S., at 716. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. See *Speiser v. Randall,* 357 U.S. 513 (1958)." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-559 (1975) (quoted with ap-

proval in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n. 13 (1980)).

The prior restraint imposed in these two cases and generally permitted under the Indiana and other similar RICO statutes is virtually identical to that struck down by the Court over 50 years ago in *Near v. Minnesota*, 283 U.S. 697 (1931). The statute in *Near* authorized enjoining a person who published an obscene or defamatory periodical from further publication of the periodical. Consistently since *Near* it has been clear that one cannot be punished for speech by the prohibition of future speech. *See, e.g., City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S. Ct. 316 (1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980).

Notwithstanding *Near* and its progeny, the Supreme Court of Indiana swept aside prior restraint concerns by reasoning that the RICO statute's forfeiture remedy

> "is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene."

*4447 Corporation v. Goldsmith*, 504 N.E.2d at 565 (Ind. 1987).

This Court, however, has made clear that the question of whether a statute operates a prior restraint must be determined not through such formal anaylsis but through a realistic inquiry into the actual effects of the

statute on protected expressive activity. As stated in *Near*, "in passing upon constitutional questions the court has regard to substance and not to mere matters of form . . . ; in accordance with familiar principles, the statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. at 708. As further stated in *Organization For A Better Austin v. Keefe*, a prior restraint exists where "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature. . . ." 402 U.S. at 418-419 (1971).

The plain effect of the forfeiture provision is to restrain future expression because of the content of prior expression. The court below avoided First Amendment analysis merely by recharacterizing the seized books and periodicals as "assets acquired through racketeering activity," indistinguishable from drugs, gambling equipment or other contraband. No such facile recharacterization can alter the fact that the statute's seizure and forfeiture provisions create the substantive harm that prior restraint doctrine aims to prevent—the repression of valuable expressive materials, which have not been adjudged obscene, as a consequence of prior speech. Labelling such expression as "racketeering" can no better strip away First Amendment protection than does labelling speech or speakers as "Nazi" (*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978)); "Communist" (*DeJonge v. Oregon*, 299 U.S. 353 (1937)); anti-semitic (*Near v. Minnesota, supra*); or "subordinators of women"

(*American Booksellers Ass'n, Inc. v. Hudnut*, 774 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)).[3]

The flaw in the Indiana RICO provisions is thus the same as in both *Near* and *Vance v. Universal Amusement Co.*, 445 U.S. at 311, fn. 3:

> In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books v. Sullivan* [cite omitted]. The separation of these forms of speech calls for "sensitive tools," *Speiser v. Randall* [cite omitted].

Such sensitivity is hardly shown by the statement of the court below that the separation between obscene and protected materials is "irrelevant."

While the RICO statute's forfeiture penalties clearly operate as an unconstitutional prior restraint when applied, perhaps more ominous and pervasive is the chilling effect which the mere threat of these draconian penalties will have on protected First Amendment activities. Booksellers, distributors and publishers will doubtless be inclined to avoid a provocative publication which may be viewed by

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[3] To the extent that crimes of violence or coercion are committed in the production of sexually-oriented material, state and federal laws, including RICO laws, provide ample opportunity for the prosecution of perpetrators. The only effect of adding the specific crime of dealing in obscenity to the list of predicate RICO offenses is to target RICO's harsh penalties at those who are criminals solely because the content of their speech is offensive. Hence, the ones prosecuted under the statute *sub judice* are not organized criminals or those who allegedly use kidnapping, violence, drugs, or coercion in the course of producing obscene material.

some as too close to the obscenity threshold when an error in judgment could lead to the forfeiture of one's business. The threat to First Amendment protections is always especially acute where questions of obscenity or "harmful to minors" are involved because "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books v. Sullivan*, 372 U.S. at 66 (1963). While the question of whether a chemical substance is an illegal drug may be determined objectively in any laboratory, the determination as to whether books or periodicals are obscene will vary from community to community, and from jury to jury, as each applies the standard of *Miller v. California*, 413 U.S. 15 (1973). The threshold of First Amendment protection becomes even dimmer and less certain when the "harmful to minors" standard of *Ginsberg v. New York*, 390 U.S. 629 (1968), is at issue, since such material by definition is First Amendment protected and has serious literary, artistic, political, or scientific value.[4]

Many familiar examples serve as reminders that books now recognized as literary classics were once banned as obscene under the standards of their day. If a RICO statute like the one involved in these cases had been widespread a few decades ago, booksellers might have had

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[4] That such "harmful to minors" statutes are subject to a multitude of widely divergent interpretations is well demonstrated by this Court's recent decision in *Virginia v. American Booksellers Association, Inc.*, 108 S. Ct. 636 (1988) (certifying to the Virginia Supreme Court the question of how such a statute should be interpreted). In the absence of a definitive state court interpretation of a "harmful to minors" statute, a bookseller could find his store padlocked after an *ex parte* RICO hearing merely because he had sold or displayed copies of a provocative bestseller to minors.

their doors padlocked merely for stocking the latest copies of works by Theodore Dreiser, D.H. Lawrence, or Edmund Wilson. *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930) (Dreiser's *An American Tragedy* held obscene); *Commonwealth v. Delacey*, 271 Mass. 327, 171 N.E. 455 (1930) (Lawrence's *Lady Chatterley's Lover* held obscene); *People v. Doubleday & Co.*, 272 App. Div. 799, 71 N.Y.S. 2d 736, *aff'd* 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd* 335 U.S. 848 (1948) (Wilson's *Memoirs of Hecate County* held obscene). Such cases as *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986) and *Council for Periodical Distributors Association v. Evans*, 642 F.Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987), show the real danger that a vocal minority in a community will use the RICO statutes to threaten the very business of any bookseller who deals in material which, though constitutionally protected, they deem objectionable. The burden will be particularly great on a regional or national book or periodical business which, by distributing material which might be considered obscene or harmful to minors in only two communities in the state, could potentially have its entire business seized.

## II

## THE INDIANA RICO STATUTE IS ALSO UNCONSTITUTIONAL BECAUSE IT LACKS ANY OF THE PROCEDURAL SAFEGUARDS REQUIRED WHEN PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIALS ARE SEIZED.

The Indiana RICO statute is also unconstitutional and should also be invalidated for failure to comply with the Court's prior rulings imposing procedural safeguards on

the seizure of presumptively First Amendment protected materials. Under the statute, property may be seized for forfeiture up to 180 days before any forfeiture action is even commenced. Ind. Code § 34-4-30.5-4. Furthermore, when the forfeiture proceeding is eventually filed, the statute imposes no fixed time limit for judicial resolution of the action, and does not even urge that resolution be prompt. In both of the cases under review, the trial courts' orders compelling the padlocking of bookstores and the seizure of all items within were issued after *ex parte* hearings, without notice to the booksellers or their attorneys. To this day, no trial date has been set in either case. This open-ended period of seizure, based on a mere probable cause showing, violates the requirement that "any restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965).

As stated in *Speiser v. Randall*, 357 U.S. at 525 (1958), the separation of obscene and protected speech requires "sensitive tools." State and federal RICO statutes are anything but sensitive tools, as evidenced by the statement of the Indiana Supreme Court that the obscenity or non-obscenity of the seized assets is irrelevant.[5] *4447 Cor-*

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[5] Even where First Amendment concerns are absent, the RICO penalty provisions have been severely criticized as crude and insensitive tools, lacking in various procedural safeguards. *See, e.g.*, Markus, *Procedural Implications of Forfeiture Under RICO, the CCE and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 Temple L. Q. 1097 (1986); Note, *Civil RICO Is A Misnomer: The Need for Criminal Procedural Protections In Actions Under 18 U.S.C. § 1964*, 100 Harvard L. Rev. 1288 (1987).

*poration v. Goldsmith*, 504 N.E.2d at 565. To permit the broadscale seizure and forfeiture of protected expressive materials by means of RICO statutes is to make a mockery of the constitutionally required procedural safeguards imposed to guard against prior restraint of materials presumptively protected by the First Amendment.

## CONCLUSION

As this Court has recently reiterated, "[f]reedoms of expression require 'breathing space.'" *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988) (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)). Moreover, the prior restraint doctrine is premised on the conviction that the circulation of offensive speech is a lesser cost than the unacceptable alternative of suppressing protected expression. As Madison said of the press: "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 571 (J. Elliott ed. 1866). Whatever the wisdom of pursuing the eradication of sexually explicit materials, attempts to eliminate them can only be undertaken after complying with First Amendment requirements of heightened sensitivity, and procedural safeguards so that provocative, unorthodox and even offensive ideas and modes of expression are not quashed.

For the reasons set forth above, we respectfully urge this Court to reverse the orders under review.

May 11, 1988

Respectfully submitted,

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87-614 (12)

MOTION FILED
MAY 6 1988

IN THE

# Supreme Court of the United States

October Term, 1987

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FORT WAYNE BOOKS, INC.,

*Petitioner,*

*vs.*

STATE OF INDIANA, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the Supreme Court of Indiana**

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and

RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,

*Petitioners,*

*vs.*

STATE OF INDIANA,

*Respondent.*

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**On Writ of Certorari to the Court of Appeals of Indiana, First District**

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## MOTION OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED

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No. 87-470

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FIRST DISTRICT

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# MOTION OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

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**MOTION OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE, FOR LEAVE TO FILE A BRIEF, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.**

## STATEMENT

The Spartacist League and Partisan Defense Committee hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court to file the attached joint brief, amici curiae, in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc. Attorneys for petitioners have consented thereto and letters to that effect are filed with this Court; the consent of the attornies for respondents was requested but refused.

## THE INTEREST OF AMICI CURIAE

The Spartacist League is a Marxist political organization with a history of over twenty years of activity in the United States, including running candidates for public office, holding classes and public forums on Marxist history, international and domestic politics, and publishes a bi-weekly newspaper, Workers Vanguard, a journal of the Women's Commission, Women and Revoltion, and a theoretical journal, Spartacist.

The Partisan Defense Committee is a class-struggle, non-sectarian legal defense organization in accordance with the political views of the Spartacist League. It gives aid and support to cases and causes in the interest of the whole of the working people.

The Spartacist League seeks to act, as Lenin described the role of the vanguard workers party, as a "tribune of the people." Thus the Spartacist League opposes all aspects of social oppression, whether stemming from race and national hatred or from the repressive sexual morality enforced by the state and bourgeois family.

As materialists, amici curiae understand that attempts today to proscribe sexuality and particular sexual practices (and their depiction in pornography) necessarily reflect the attitudes, values and prejudices shaped by class society.

The Spartacist League has a longstanding position against government regulation of private life. Amici curiae do not advocate any particular sexual practices, but define their position essentially in the negative: against this state's attempts to censor, limit

and cripple human sexual expression in the service of its own reactionary ideology.

The issue presented in these cases is whether the government can criminalize First Amendment communicative materials, seize and destroy them and imprison their distributors--simply by alleging "obscenity". In these cases the government applied the most powerful weapon in its legal arsenal to an area of social concern inseparably connected to humanity's most public and most private worlds--opinion and sex. The current battleground is personal freedoms--focused on the three-letter word "sex." The battle cry of the government and its religious surrogates is the "protection of morality, family, children."

These cases represent government's frontal assault on First Amendment protection of the spoken and written word,

books, films, and the right to publish and distribute communicative material. The starting point is the current majority position of the Supreme Court that the First Amendment in not an absolute--that an "obscenity" exception exists. The established tests for "obscenity" are subjective, imbued with religious considerations, and justified on the basis of a false history of the First Amendment obscenity exception.

Until now, it has been a principle of constitutional law that communicative material is protected by the First Amendment and is not "obscene" until there has been a judicial determination. Even where materials are considered "obscene," due process mandates apply. This is axiomatic, a minimum condition for the First Amendment to have meaning.

The application of RICO provisions to anti-obscenity laws abrogates First

Amendment protection for communicative materials. Under RICO an ex parte ruling of probable cause that two or more individual items are "obscene" can legally justify the seizure of all other First Amendment materials owned by the alleged offender, without a trial or judicial determination. The prosecutor can choose venue in order to best secure initial forfeiture and then conviction.

Thus these cases pose in stark relief whether the First Amendment is fact or fiction; whether by an Orwellian turn of phrase books, magazines, and video movies can be transformed from First Amendment materials to fruits of racketeering.

In view of the foregoing, amici curiae seek leave to file the attached brief.

Respectfully submitted,

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Dated: New York, New York
May 12, 1988

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**BRIEF OF SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.**

---

## STATEMENT

The Spartacist League and Partisan Defense Committee submit this brief, amici curiae, in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc., having submitted a motion for permission to file same.

## INTEREST OF AMICI CURIAE

The Spartacist League is a Marxist political organization with a history of over twenty years of activity in the United States, including running candi-

dates for public office, holding classes and public forums on Marxist history, international and domestic politics, and publishes a bi-weekly newspaper, Workers Vanguard, a journal of the Women's Commission, Women and Revolution, and a theoretical journal, Spartacist.

The Partisan Defense Committee is a class-struggle, non-sectarian legal defense organization in accordance with the political views of the Spartacist League. It gives aid and support to cases and causes in the interest of the whole of the working people.

The Spartacist League seeks to act, as Lenin described the role of the vanguard workers party, as a "tribune of the people." Thus the Spartacist League opposes all aspects of social oppression, whether stemming from race and national hatred or from the repressive sexual mo-

rality enforced by the state and bourgeois family.

Social bigotry, racism and religion are the ideological concomitants of the drive against "godless communism" abroad and blacks, minorities and unions at home. There is a desire by the American rulers to recreate the reactionary environment of the 1950's--the first and last decade of the American century--a period pre-Vietnam, pre-"sexual liberation," pre-civil rights movement and above all pre-American capitalism's loss of world economic and military hegemony.

As Marxists, amici curiae are defenders of democratic rights, recognizing the root cause of the contraction of constitutionally protected rights lies in class nature of the state. Harold Laski explains in his treatise The State in Theory and Practice (1935):

> "...how accidental was the union of capitalism with democracy. It was

> the outcome, not of an essential harmony of inner principle, but of that epoch in economic evolution when capitalism was in its phase of expansion. It had conferred political power upon the masses; but it was upon the saving condition that political power should not be utilized to cut at the root of capitalist postulates. It would offer social reforms so long as these did not jeopardize the essential relations of the capitalist system. When they did as occurred in the post-war [World War I] years, the contradiction between capitalism and democracy became the essential institutional feature of Western civilization."

As materialists, amici curiae understand that attempts today to proscribe sexuality and particular sexual practices (and their depiction in pornography) necessarily reflect the attitudes, values and prejudices shaped by this class society. Most prominent is the hypocritical glorification of the monogamous family unit, which Marxists have classically defined as the main Western social institution oppressing women. The "family values" the pornography police claim to

uphold are in fact justification for depriving women of equal status not only in the market place but in relation to their own bodies.

The purported reverence for the family reeks with hypocrisy. Families have been destroyed by waves of deindustrialization, slashing of social programs and all-sided attacks on the trade unions, the poor, blacks, aged and the young. The rallying call of the anti-pornography bigots and Moral Majorities to "save the children" has spawned a five-year witchhunt against day-care centers, desperately needed by working women. Meanwhile enormous suffering has been inflicted on the children of this country--from infancy to adolescence, children are the largest section of the American population hit by the economic austerity enforced by both Republicans and Democrats.

Pre-eminent American novelist and social commentator, Gore Vidal has aptly stated "sex is politics" noting that the

> "sexual attitudes of any given society are the result of political decisions... Today Americans are in a state of terminal hysteria on the subject of sex in general and of homosexuality in particular because the owners of the country regard the family as the last means of control over those who work and consume."
>
> Gore Vidal, "Sex Is Politics," The Second American Revolution (1982).

Those whose private sexual life does not conform to the official values of "Judeo-Christianity" and this capitalist state are subject to heavy penalties, as the decision of this Court upholding sodomy laws in Georgia--which specifically made reference to Biblical tradition--made clear.[1] Censoring sexual expression via video, print or photograph is a continuation of this sex witchhunt.

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[1] Bowers v. Hardwick, __U.S.__, 106 S. Ct. 2841 (1986).

The Spartacist League has a long-standing position against government regulation of private life. As stated in the Spartacist League document Youth, Class and Party (1971), "...we call for an end to all laws against what are known as 'crimes without victims' (e.g., prostitution, pornography, gambling, drug addiction, anti-liquor laws).... Laws against gambling and various sexual practices reflect official puritanism allied to organized religion, which acts as an important ideological pillar of capitalism, convincing the masses there can be no happiness this side of the grave."

The shameful hypocrisy of this system of state-enforced oppression of women is revealed by the existence of prostitution, the inevitable companion of the enforced monogamy of the family. Certainly some pornography reflects the frustrations and hostilities engendered

by this repressive society. Amici curiae do not advocate any particular sexual practices, but define their position essentially in the negative: against this state's attempts to censor, limit and cripple human sexual expression in the service of its own reactionary ideology. This follows the classic Marxist tradition, as expressed by Frederick Engels over one hundred years ago in The Origin of the Family, Private Property and the State (1884):

> "Thus, what can we conjecture at present about the regulation of sex relationships after the impending effacement of capitalist production is, in the main, of a negative character, limited mostly to what will vanish. But what will be added? That will be settled after a new generation has grown up: a generation of men who never in all their lives have had occasion to purchase a woman's surrender either with money or with any other means of social power; and of women who have never been obliged to surrender to any man out of any consideration other than that of real love, or to refrain from giving themselves to their beloved for fear of the economic consequences. Once such people

> appear, they will not care a rap about what we today think they should do. They will establish their own practice and their own public opinion, conformable therewith, on the practice of each individual--and that's the end of it."

People have the right to read or look at whatever they want, to write, paint or film it too, and to engage in whatever sexual practices (or none at all) they choose, so long as they're consensual. The point is neither to proscribe, nor prescribe, what kind of sex people "should" have. As the Marxist historian Isaac Deutscher noted at a 1966 Socialist Scholars Conference:

> "We do not maintain that socialism is going to solve all predicaments of the human race. We are struggling in the first instance with the predicaments that are of man's making and that man can resolve.
>
> "May I remind you that Trotsky, for instance, speaks of three basic tragedies--hunger, sex, and death---besetting man. Hunger is the enemy that Marxism and the modern labor movement have taken on.
>
> "Yes, socialist man will still be pursued by sex and death; but we are

> convinced that he will be better equipped than we are to cope even with these.... We do not see in socialist man evolution's last and perfect product, or the end of history, but in a sense only the beginning of history."

For the reasons set forth above the Spartacist League and Partisan Defense Committee are compelled to submit this Brief Amici Curiae in support of the petitioners.

## STATEMENT OF CASE

The issue presented in these cases is whether the government can criminalize First Amendment communicative materials, seize and destroy them and imprison their distributors--simply by alleging "obscenity". That is what the State of Indiana did do, and what the federal government intends by making "obscenity" a predicate offense under RICO[2]. In these cases the

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[2] Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. sec. 1961, et seq., particularly the

government applied the most powerful weapon in its legal arsenal to an area of social concern inseparably connected to humanity's most public and most private worlds--opinion and sex. The case does not come before this Court without history or context.[3] There is a call to arms against constitutional rights. The current battleground is personal freedoms--focused on the three-letter word "sex." The battle cry of the government and its religious surrogates is the "pro-

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forfeiture provisions of sec. 1963. In 1984, Congress amended section 1961 (1) to include obscenity offenses in the definition of racketeering activity. The Indiana RICO statute is modeled after the Federal RICO statute and is similar to the RICO statutes in many other cases.

[3] The Attorney General's Commission of Pornography, Final Report, July 1986, made 93 recommendations including targeting cable and satellite TV for obscenity prosecutions, using RICO laws to prosecute and seize the assets of obscenity targets, and most ominously calling for the creation of private groups to challenge most communicative materials from erotic magazines to videotapes.

tection of morality, family, children."

These cases represent government's frontal assault on First Amendment protection of the spoken and written word, books, films, and the right to publish and distribute communicative material. The starting point is the current majority position of the Supreme Court that the First Amendment in not an absolute--that an "obscenity" exception exists. The established tests for "obscenity" are subjective, imbued with religious considerations, and justified on the basis of a false history of the First Amendment obscenity exception.

Until now, it has been a principle of constitutional law that communicative material is protected by the First Amendment and is not "obscene" until there has been a judicial determination. Even where materials are considered "obscene," due process mandates apply. This is

axiomatic, a minimum condition for the First Amendment to have meaning.

The application of RICO provisions to anti-obscenity laws abrogates First Amendment protection for communicative materials. Under RICO an ex parte ruling of probable cause that two or more individual items are "obscene" can legally justify the seizure of all other First Amendment materials owned by the alleged offender, without a trial or judicial determination. The prosecutor can choose venue in order to best secure initial forfeiture and then conviction.

Thus these cases pose in stark relief whether the First Amendment is fact or fiction; whether by an Orwellian turn of phrase books, magazines, and video movies can be transformed from First Amendment materials to fruits of racketeering.

## LEGAL ARGUMENT

### THE INDIANA RICO STATUTE IS UNCONSTITUTIONAL IN VIOLATION OF THE FIRST AMENDMENT WHEN APPLIED BASED ON PREDICATE "OBSCENITY" OFFENSES

The First Amendment rights are intertwined and indivisible, part of a whole. The First Amendment encapsulates the philosophy of the enlightenment in opposition to the philosophy of obscurantism, the breaking of feudal fetters on political freedom, economic freedom, religious freedom and scientific freedom.

The First Amendment is a unified totality, the "text is indeed both general and absolute. In one sentence it separates church and state and guarantees free opinion." [4]

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[4] Franklin, "Infamy and Constitutional Civil Liberties," Lawyers Guild Review, Vol. XIV, No. 1, p. 3 (1954)

"The First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom," Mr. Justice Black, dissenting in Dennis v. United States, 341 U.S. 494, 580 (1951).

The First Amendment is unified in its various clauses by the central liberty of freedom of the individual in matters of thought and conscience--whether the concerns are political, religious or social.[5] The legal force of the

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[5] In Prince v. Massachusetts, 321 U.S. 158, 164 (1944), the Court wrote: "If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. Schneider v. State, 308 U.S. 147; Cantwell v. Connecticut, 310 U.S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. but they have unity in the charter's prime place because they have unity in their human sources and

First Amendment applied only to the federal government until the battlefields of the Civil War, defeating slavery, provided the basis for a national American state. Legally this was codified in the Reconstruction Amendments, the Thirteen, Fourteenth and Fifteenth Amendments to the U.S. Constitution, subordinating subordinating the state governments to these democratic principles. See, Gitlow v. New York, 268 U.S. 652 (1925), Cantwell v. Connecticut, 310 U.S. 296 (1940).

Constitutional history discloses that particularly when the populace is being prepared for war, the protections

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functioning." See also, Widmar v. Vincent, 454 U.S. 263, 268 (1981), Wallace v.Jaffee, 472 U.S. (1985). "The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government." Board of Education v. Minor 23 Ohio St 211,253 (1872) quoted approvingly in Abington School District v. Schempp, 374 U.S. 215, n 7 (1963).

of the First Amendment are ignored.[6] And, in the midst of a national hysteria around AIDS, in Bowers v. Hardwick, __U.S.__, 106 S. Ct. 2841 (1986) this Court upheld Georgia's sodomy law, crimi-

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[6] The Bill of Rights was less than a decade old in 1798 when war hysteria prompted the Federalist-dominated Congress to enact the Alien and Sedition Acts. Constitutional challenges to the Acts were generally precluded in the federal courts. During World War I, the Espionage Act of 1917 and the Sedition Act of 1918 were passed and then upheld by the Supreme Court in Schenck v. United States, 249 U.S. 47 (1919). In 1940 Congress, concerned with the increased possibility of United States entry into World War II, passed the Alien Registration Act (better known as the Smith Act). The first to be prosecuted were the Trotskyists of the Socialist Workers Party. The convictions for conspiring to overthrow the government by force and violence were affirmed by the Court of Appeals, Dunne v. United States, 138 F2d 137; 320 U.S. 790 (1943), and the Supreme Court refused review. The internment of American citizens of Japanese descent during World War II, Korematsu v. United States, 320 U.S. 214 (1944) is a notorious example. Post-World War II, during the McCarthy anti-communist witchhunts, members of the Communist Party were convicted under the Smith Act, Dennis v. United States, 341 U.S. 494 (1951).

nalizing particular sex acts between consenting adults, homosexuals and heterosexuals alike, in the privacy of home.

However, judicial claims that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance,"[7] are simply and clearly erroneous. There is no judicial precedent from British common law or the new American republic regarding prosecution of obscenity. There is no evidence the founding fathers ever considered sexually obscene speech or writings an offense. Reported common law prosecutions were based not on concerns of sexual improprieties but political and religious themes, particu-

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[7] Roth v. United States, 354 U.S. 476, 484 (1957) and cases cited therein at pps. 481-485; Miller v. California, 413 U.S. 15, 20 (1973).

larly an attack on the state religion.[8] The earliest licensing systems begun by Henry VII in 1538 were primarily addressed to the vices of sedition and heresy.[9] The eighteenth-century decisions generally relied on as the basis of our obscenity prosecutions instead establish the political nature of these cases.[10]

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[8] In Schroeder, "Obscene Literature at Common Law," 69 Albany L.J. 146 (1907) it is argued that, "Since England had an established church, naturally anything (including the so-called obscene publications) which discredited the official religion would also be held libelous...From the suppression of 'obscene impiety,' has erroneously grown the notion that all so-called 'obscene' literature was suppressed at common law."

[9] See, generally Alshuler, "Origins of the Law of Obscenity," in 2 Technical Report of the Commission on Obscenity and Pornography 65 (1970).

[10] See, Reynolds, "Our Misplaced Reliance on Early Obscenity Cases." 61 A.B.A.J. 220, 222 (1975). "Obscenity was not viewed by the courts as terribly serious matter. Sedley's [Sir Charles Sydles Case, 1 Keble 620, 1663] true offense was breach of the peace and inciting a riot [Sedley disrobed, harangued his audience with antireligious epithets as he showered them with bottles

At the time of the American Revolution there was no common law obscenity and only one state had any statutory law and that was most likely directed against religious blashemy.[11] With that excep-

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of urine]. Curll [Dominus Rex v. Curl, 2 Strange 788, 1727] had antagonized the government, and Wilkes [4 Burr. 2527, 1770] was first on the cabinet's list of political enemies. Read, the only defendant whose case involved simply a vulgar book, was acquitted in the higher court. The chief offender in this literature, Fanny Hill, had great vogue and was not prosecuted....Although the three affirmed convictions were political, our courts have overlooked that and have considered them the foundation of obscenity prosecutions. The basis of Read's acquittal is that no one was hurt and the peace was not broken. The 1970 obscenity commission returned to that viewpoint, seeing no harm in the distribution of sexual materials among consenting adults. The judges in the Read case said the offense, if any, was spiritual, not temporal. Of course, we have no ecclesiastical courts, but as to Fanny Hill, the commission would advise, in effect, as does the ghost concerning Hamlet's mother: 'Leave her to heaven.'"

[11] In 1711, Massachusetts had a censorship system which included the "wicked, profane, impure, filthy and obscene..." Ancient Charter, Colony Laws

tion, at the time of the adoption of the Constitution and Bill of Rights, the states had no law excluding "obscenity" from the regime of freedom of expression and press that then existed. Thus, in the words of Mr. Justice Douglas "the creation of the 'obscenity' exception to the First Amendment was a legislative and judicial tour de force."[12]

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and Province Laws of Massachusetts Bay, 1814. See, Schroeder, supra, at 149, "A further confirmation of our conclusion that the common law of England and America knew of no such crime as circulating obscene literature except when it was of the particular kind which directly discredits religion, we may point to the law-book writers of the time, who uniformly classified it as an offense against God, not at all as one of any other direct consequences to the civil order. With the creation of our secular commonwealths, wherein a union of church and state is forbidden, our constitutions have repealed all the common law offenses against God. Writers such as Blackstone make no mention of such an offense except as an offense against God."

[12] Paris Adult Theatre I v. Sloan, 413 U.S. 49, 70-71, (1973) (Douglas, J., dissenting). See, Goebel, Development of Legal Institutions (1946).

Furthermore, the First Amendment was, until the adoption of the Fourteenth Amendment, a restraint only upon federal power. There is an absence of any federal cases or laws relative to obscenity in the period immediately after the adoption of the First Amendment.

Criminalization of purportedly obscene writings has significantly peaked at key periods of social change. Only four states made obscenity the object of the criminal law prior to the Civil War, and a federal customs law aimed at the French post card trade was passed in 1842 which excluded printed matter from regulation. These statues were not rigidly enforced. In 1821 a Massachusetts bookdealer was sentenced to six months in jail for selling Fanny Hill to local farmers. The few obscenity cases prosecuted between 1821 and 1870 were general-

ly guides to marital sex containing contraceptive information.

It was not until the period of post-Reconstruction reaction that Congress passed legislation relating to obscenity. After the Civil War, mass printing, literacy, second-class postal rates, combined with the presence of single men living outside family supervision in the cities provided a market for sexual commerce. "An Act for the Suppression of Trade in, and Circulation of Obscene Literature and Articles of Immoral Use," had as its object the specific prohibition of advertising and mailing of birth control information.[13]

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[13] This Act, 17 Stat 599 (1873), was promulgated by one Anthony Comstock who personally supervised its enforcement as an unpaid postal inspector. In 1875 alone he led forty-seven arrests, twenty-eight convictions and ninety-one hundred fines. Comstock destroyed something over fifty tons of vile books [and] 3,984,063 obscene pictures. It took the concerted campaign of Margaret Sanger to make birth control information available to women to

As late as 1948, the Court could say that many state obscenity statutes had "lain dormant for decades." Winters v. New York, 333 U.S. 507, 511 (1948). It was not until 1957 in Roth v. United States, 354 U.S. 476 (1957) that the issue "whether obscenity is utterance within the area of protected speech and press" was "squarely presented" to this Court.

In Roth this Court held that certain expression is "obscene" and thus outside the prctection of the First Amendment while upholding individual books, such as classics like Fanny Hill, as not being "obscene."[14] Post World War II, Cold War politics found expression in sexual poli-

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defeat Comstock and his cronies in the Societies for the Suppression of Vice, Women's Christian Temperance Union, and the YMCA, forty years later.

[14] Memoirs v. Massachusetts, 383 U.S. 413 (1966).

tics--preoccupation with family stability, "internal subversion," "moral fiber" and "decency." The focus of the Courts turned to commercial distribution of allegedly obscene materials--books, magazines, and more recently video movies.

This Court has not found it possible to arrive at an objective legal standard of obscenity. The court established standards are imbued with religious, moral and subjective literary determinations. From the initial formulation defining "obscenity" in Roth v. United States, supra[15] until this Court's decision in Miller v. California, 413 U.S. 15 (1973), no majority of the Supreme Court has at any given time been able to agree

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[15] The standard as stated in Roth v. United States, supra, 489 in the opinion written by Mr. Justice Brennan was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power and excepted from the protection of the First Amendment.[16] See, e.g., Redrup v. New York, 386 U.S. 767, at 770-771 (1969).

The "test" set forth in Miller, supra, at 24 is a three-part guideline for the trier of fact: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a

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[16] As set forth in Miller, supra, at p. 18-19, this Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," Roth v. United States, supra,

whole, lacks serious literary, artistic, political, or scientific value."

The absolute failure of the Court established obscenity tests, was addressed by Mr. Justice Brennan dissenting in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1972):

> "Any effort to draw a constitutionally acceptable boundary on state power must resort of such indefinite concepts as 'purient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the person defining them. Although we have assumed that obscenity does exist and that we 'know it when [we] see it,' Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between the protected and unprotected speech."
>
> "Recognizing that 'freedoms of expression . . .are vulnerable to gravely damaging yet barely visible encroachment,' Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 66 (1963), we have demanded that 'sensitive tools' be used to carry out the 'separation of legitimate from illegitimate speech.' Speiser v. Randall, 357 U.S. 513. 525 (1958). The essence of our problem in the obsce-

> nity area is that we have been unable to provide 'sensitive tools' to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter. The attempt, as the late Mr. Justice Harlan observed, has only 'produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-705 (1968) (Separate opinion).
>
> "These considerations suggest that no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment." Id. at 79-80.

Contrary to the protestations and assertions of the Court that the "States have the power to make a morally neutral judgement" and to criminalize obscenity, Id. at 69, the protection of public de-

cency concept is at bottom religious.[17]

Religious beliefs and determinations of morality cannot dictate what is permissible for man to read, think, fantasize--be it the classics or "smut"; erotica or pornography. Absent physical harm to another, it is no concern of the

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[17] See, Henkin, "Morals and the Constitution: The Sin of Obscenity," 63 Col.L.Rev.391, 392-395 (1963) where it is argued that obscenity laws are not based on any concern for the prevention of sex offenses or other forms of crime, but are "rooted in this country's religious antecedents, of governmental responsibility for communal and individual decency and morality....Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the `consumer'. Obscenity, at bottom, is not crime. Obscenity is sin."

state. Established First Amendment law does not permit religious or moral determination of "public consensus." West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959) First Amendment protection is "not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."; Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) that "most individuals agree with the thrust of NeW Hampshire's motto is not the test; ... [t]he First Amendment

protects the right of individuals to hold a point of view different from the majority and to refuse to foster... an idea they find morally objectionable."

Nor do First Amendment protections depend on whether some majority (or vociferous minority's) concept of "social worth" or "seriousness," Gooding v. Wilson, 405 U.S. 518 (1972), Cohen v. California, 403 U.S. 15 (1971), Terminello v. Chicago, 337 U.S. 1 (1949). "The Constitution protects the right to receive information and ideas," and that "[t]his right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." Stanley v. Georgia, 394 U.S. 557, at 564 (1969). See Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Winters v. New York, supra at 510; Lamont v. Postmaster General, 381 U.S. 301, 307-308 (1965) (concurring opinion).

This right is closely tied, as Stanley recognized, to "the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." 394 U.S., at 564. It is similarly related to "right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (italics omitted), Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), and the right to exercise "autonomous control over the development and expression of one's intellect, interests, tastes, and personality." (Italics omitted.) Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas J., concurring).

There is a right of privacy or liberty in matters related to marriage, family and sex. Griswold v. Connecticut, 321 U.S. 479 (1965), Loring v. Virginia,

388 U.S. 1 (1967), Skinner v. Oklahoma, 316 U.S. 535 (1942).

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J.,dissenting).

These established premises of individual liberty provide the basis that the state can not assert a right to protect the individual from the effects of obscenity. The state's criminalization of what it considers to be obscenity amounts to nothing more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the mandate of the First Amendment.

Moreover, this Court has further left the question of what constitutes obscenity undefinable because the community standard to be applied is not an objective, national one but intended to vary from community to community. In the words of this Court there should not be "fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive"... It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City, Miller v. California, supra, at 30, 32. Thus prior to judicial determination what is purportedly obscene or not is cannot be known.

Obscenity is a wholly improper predicate RICO offense. The mere allegation that communicative material is obscene

starts the process of the draconian RICO punishment and forfeiture scheme, allowing First Amendment materials not even alleged to be proscribed to be seized. RICO, therefore comprises a constitutionally impermissible prior restraint of protected First Amendment materials. Any system of prior restraints of expression bears a heavy presumption against its constitutional validity. It is tolerated only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint, Near v. Minnesota, 283 U.S. 691, 720-721 (1931).

RICO sanctions violate longstanding constitutional solicitude for sexually explicit expression that does not fall into the circumscribed category, Jenkins v. Georgia, 418 U.S. 153 (1974). When seeking to restrict the dissemination of

unprotected obscenity, government "is not free to adopt whatever procedure it pleases without regard to the possible consequences for constitutionally protected speech," Marcus v. Property Search Warrant, 367 U.S. 717, 731 (1961).

The Supreme Court has repeatedly stressed that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished, is finely drawn. ... The separation of legitimate from illegitimate speech calls for...sensitive tools," Speiser v. Randall, 357 U.S. 513, 525 (1969). The First Amendment principle applies with particular force when government regulates obscenity. "[C]onstitutionally protected expression...is often separated from obscenity only by a dim and uncertain line," Bantam Books v. Sullivan, 372 U.S. 58,66 (1963). Given this indeterminacy, a statutory scheme,

such as RICO, drawn without appropriate precision and sensitivity to First Amendment principles risks punishing and deterring a substantial range of protected expression. RICO is a mallet, not the "sensitive tool" required by this Court.

In evaluating the extent to which a particular regulation will "chill" protected expression, the Supreme Court has directed courts to consider the precision with which the government has defined the proscription. Ambiguous or sweeping proscriptions will cause potential speakers to self-censor out of inability to determine what expression will lead to official sanction. Speiser v. Randall, supra; Thomas v. Collins, 323 U.S. 526, 535 (1945). The Supreme Court has also directed courts to consider the severity of punishment imposed for transgressing the prohibition, New York v. Ferber, 458

U.S. 747, 774 (1982). Punishment chills more as it becomes more severe.

These well-established principles require invalidation of the RICO statute as applied based on obscenity crimes. RICO is certain to chill a vast amount of constitutionally protected expression. The statutory scheme is both vague in the scope of its proscriptions and draconian in the severity of its punishments.

Because only a "dim line" separates obscenity from protected expression, obscenity regulation necessarily imposes uncertainty upon potential speakers. Miller v. California, supra explicitly incorporates variable local community standards in the determination whether material is determined obscene. But the scope of RICO's definition of "pattern of racketeering activity" compounds the uncertainty exponentially. RICO's nationwide scope poses grave dangers for an

entity engaged in nationwide distribution of materials containing some sexual content. Expression that the vast majority of communities would consider appropriate might nonetheless be found to be obscene in one or two communities. Under RICO, two such findings of obscenity subject the distributor to criminal liability that includes forfeiture of the entire nationwide business. Moreover, there is no way to discern or predict reliably the standards of small communities in distant parts of a state or the country. RICO places power in the hands of local prosecutors far in excess of that traditionally given in the evolved law of obscenity. "Just as ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of a work vary from community to community based on the degree of local acceptance

it has won." Pope v. Illinois, 107 S.Ct. 1918,1921 (1987).

The severity of RICO's punishment scheme also exerts a powerful chilling effect. The RICO forfeiture provision taints the income received from all sexually explicit expression, because two isolated examples of that expression might later be found to be "obscene" in a single community anywhere in the state or country. Any person who derives income from the proceeds of such expression is at risk not only of prolonged imprisonment and huge fines, but also the forfeiture of his entire enterprise, if that enterprise either received such proceeds, or was involved in the production, transportation, or dissemination of the expression.

Either the scope of the proscription or the severity of the punishment alone imposes a sufficient chill on free ex-

pression to require invalidation of the statute. In RICO, however, the two effects merge. A potential speaker must confront not only the indeterminacy of RICO's substantive scope but also the daunting risk of draconian penalties, including forfeiture of virtually all assets if the speaker errs in estimating what speech will fall on the protected side of the First Amendment line. Unlike those who engage in other activities targeted by RICO, the distributor of such materials in all likelihood is engaging in activity he not only deems not illegal, but in fact protected by the First Amendment. Notwithstanding, based upon the prejudices of local prosecutors, and without benefit of a full judicial determination, RICO paints such distributor with the brush of "racketeering" and the full brunt of its draconian sanctions.

The application of RICO to obscenity will thus have a chilling effect on protected expression unprecedented in its breadth. For all the reasons set forth above, this Court should therefore declare the extension of RICO to obscenity crimes unconstitutional.

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Respectfully submitted,

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